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Report of the Special Rapporteur on the right to education

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the right to education, Kishore Singh, prepared pursuant to Council resolution 26/17. The report addresses issues and challenges to the right to education in the digital age, with a focus on higher education. It considers how the norms and principles that underlie the right to education should be upheld while embracing digital technologies.

The report concludes with recommendations for ensuring that the use of digital technology in education is in keeping with State obligations on the right to education.

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I. Introduction

1. The present report was prepared by the Special Rapporteur on the right to education pursuant to Human Rights Council resolution 26/17. In it, the Special Rapporteur examines the right to education in the digital age and, specifically, how to uphold the norms and principles that underlie the right to education while embracing digital technologies, which are revolutionizing teaching and learning processes and transforming the landscape of higher education. He considers issues related to marginalization and exclusion, as well as the quality of education, especially human values in education. Concerns are expressed about the digital divide and about how it affects fundamental principles, such as equality of opportunity. The Special Rapporteur sets out policy and legal responses to address these issues and challenges, bearing in mind the normative framework of the right to education as established in international human rights treaties. He also highlights the repercussions of digital technologies on public investment in education and on the quality of education, especially in respect of preserving human values in education, and underlines the need to safeguard education as a public good. Finally, he offers a set of recommendations for ensuring that the implementation of digital technology in education is in keeping with State obligations on the right to education as laid down in international human rights conventions.

2. During the reporting period, the Special Rapporteur undertook a mission to Fiji and reported to the General Assembly at its seventieth session (A/70/342). In that report, he addressed public-private partnerships and the right to education, noting their linkage to increasing privatization in the sector. He highlighted their implications for the right to education and for the principles of social justice and equity. He concluded with recommendations on regulating such partnerships to safeguard the right to education and protect education as a public good.

II. Recent activities undertaken by the Special Rapporteur

3. From 25 to 27 May 2015, the Special Rapporteur attended a conference on the justiciability of the right to education and the post-2015 development agenda, organized by the Centre for Law and Policy Research in Bangalore, India, where he gave the opening and closing addresses. In his interventions, he stressed the importance of holding Governments accountable and called upon civil society and the intellectual community to defend education as a public good.

4. On 10 June, the Special Rapporteur participated in a round-table expert consultation on public-private partnerships in education, hosted by the Open Society Foundation, and interacted with experts from universities in Europe, North America and Asia, while addressing the issues of public-private partnerships worldwide, including the Chilean voucher model. Also on 10 June, he participated in a seminar on the application of standards on economic, social and cultural rights in domestic law, hosted by the International Organization for the Right to Education and Freedom of Education and the Permanent Mission of Portugal to the United Nations Office and other international organizations in Geneva. His intervention focused on the justiciability of the right to education and on Human Rights Council resolution 28/20, which underlines the importance of an effective remedy for violations of economic, social and cultural rights.

5. On 12 June, he spoke at an event on human rights policy responses to the growth of private actors in education, hosted by the Global Initiative for Economic, Social and Cultural Rights, the Right to Education Project, the Privatisation in Education Research Initiative and the Geneva Academy of International Humanitarian Law and Human Rights.

His intervention underlined the need to address the concerns raised by growing privatization in education.

6. On 16 June, the Special Rapporteur spoke at the Human Rights Council panel on the theme "Realizing the equal enjoyment of the right to education by every girl". He emphasized the need to ensure the quality of education and safe school environments. He urged States to ratify international human rights conventions, combat gender stereotypes and take positive actions in favour of girls. On 18 June, the Special Rapporteur held an interactive dialogue hosted by a Geneva-based non-governmental organization, Platform on the Right to Education, at an event organized to discuss continued engagement in his work and his latest report to the Council.

7. From 22 to 27 June, the Special Rapporteur participated in the nineteenth Conference of Commonwealth Education Ministers, hosted by the Bahamas. On 23 June, he spoke at the regional ministerial caucus, addressing key issues relating to the right to education. He also addressed the teachers' forum organized during the Conference, emphasizing the need to safeguard education from forces of privatization, especially its negative repercussions on the teaching profession.

8. From 21 to 24 July, the Special Rapporteur participated in the seventh World Congress of Education International, held in Ottawa, and underlined the need for a dynamic global response to safeguard education from it commercialization and preserve education as a social good and the importance of the resolution adopted by the World Congress on privatization in and commercialization of education.

9. On 28 July, the Special Rapporteur participated in a webinar on the challenges posed by public-private partnerships in realizing the right to education, convened by the Oxford Human Rights Hub and the Open Society Foundation. The webinar served as a global expert consultation on issues relevant to the Special Rapporteur's report to the General Assembly.

10. On 18 and 19 August, the Special Rapporteur participated in a forum on the development of Xinjiang, China. In the opening address, he underlined the importance of the forum in the context of the post-2015 sustainable development agenda, of developing skills, of international development cooperation and of adopting an integrated approach to education.

11. On 21 August, the Special Rapporteur gave an opening address at an international symposium on the grassland silk road and world civilization organized by the Inner Mongolia Academy of Social Sciences and held in Huhhot, Inner Mongolia Autonomous Region of China. He highlighted the importance of the symposium in providing a better appreciation for the richness of intangible heritage.

12. On 26 August, the Special Rapporteur spoke about the right to education to members and students of the Indian Law Institute, in New Delhi. On 5 September, he gave a public lecture on contemporary issues and challenges relating to the right to education for emerging and developing countries at the Centre for Social Sciences and Humanities, also in New Delhi.

13. On 8 September, the Special Rapporteur participated in a high-level panel, organized to mark International Literacy Day, held at the headquarters of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in Paris. He spoke of literacy as a right and about the relationship between that right and lifelong learning, and focused on its implications and conceptual issues in view of the sustainable development agenda to be adopted by the General Assembly.

14. From 30 September to 2 October, the Special Rapporteur was in Moscow to address the Peoples' Friendship University of Russia, where he gave a lecture on the right to

education and international law. During his stay, he also gave a lecture at Kutafin Moscow State Law University on the right to education.

15. On 12 and 13 October, the Special Rapporteur participated in the international seminar on human rights education organized by the Independent Permanent Human Rights Commission of the Organization of Islamic Cooperation and the Government of Indonesia, held in Jakarta. In his address, he discussed the need to promote human rights education through public education policies.

16. On 26 October, the Special Rapporteur addressed the opening session of the fourth International Scientific Congress "Globalistics", organized on the occasion of celebrations to mark the seventieth anniversary of the United Nations at Lomonosov Moscow State University. He focused on the right to education and the challenges of globalization, underlining the importance of upholding the ideals and principles of the United Nations.

17. On 27 and 28 October, he addressed the plenary session of the BRICS University Summit, on the theme "Education as a source of global development", held in Moscow on the occasion of celebrations to mark the seventieth anniversary of the United Nations. The event was organized by the Moscow State Institute of International Relations and a consortium of leading Russian universities. He spoke on the right to education, the importance of skills development, new modalities for recognizing studies and qualifications gained in different places, especially in private higher education institutions, the need for regulating privatization and safeguarding humanistic mission of education.

18. On 4 November, the Special Rapporteur spoke at the Education 2030 high-level meeting organized by UNESCO and held in Paris during the thirty-eighth session of the UNESCO General Conference. He spoke of the current challenges, including privatization, lack of investment and private-public partnerships in education.

19. On 17 November, he gave a speech as a special guest at the meeting of BRICS senior officials on education organized by the Ministry of Education and Science of the Russian Federation. The meeting aimed to create a network of universities. The Special Rapporteur spoke about the right to higher education and proposed public policy responses to the internationalization of higher education.

20. On 23 November, the Special Rapporteur addressed the opening session of the regional consultation and dialogue on a framework for action on Education 2030 for West and Central African countries, organized by the UNESCO regional office in Dakar and partners. He emphasized the need for taking specific measures, including the establishment of monitoring mechanisms, to make progress in implementing the Education 2030 agenda. On 25 November, he addressed the closing session of the regional consultation.

21. On 3 February 2016, the Special Rapporteur held discussions with the Brussels-based organization Education International on a potential collaboration on the theme of privatization and commercialization of education. During the discussions, the Special Rapporteur and the representatives of Education International spoke of how to jointly promote government accountability in education in the sustainable development agenda and how to collaborate on advocating quality education for all as a fundamental human right.

22. On 15 February, the Special Rapporteur addressed the National University of Educational Planning and Administration, New Delhi, at a seminar on a rights-based approach to education. In his address, he discussed Indian education policy and the challenges it faces in realizing the right to education, particularly regarding its national legal system and the sustainable development agenda.

23. On 10 March, he took part in a discussion on gender equality and international law held at UNESCO headquarters in Paris on the occasion of International Women's Day. He underlined the need for a human-rights based approach that took into consideration critical

issues such as religion and culture and the work of the Committee on the Elimination of Discrimination against Women, and spoke of the challenges to women's equitable access to education.

24. On 14 March, the Special Rapporteur participated, as a panellist, in an event organized by the Permanent Mission of the Plurinational State of Bolivia to the United Nations Office and other international organizations in Geneva, and addressed the education-related goals in the post-2015 sustainable development agenda.

25. On 15 March, the Special Rapporteur met with representatives of the Platform on the Right to Education to talk about the work being done in fulfilment of his mandate.

III. The digital revolution in education

26. Digital technologies[1] are becoming ubiquitous and provide vast opportunities for new forms of connections and collaboration, as knowledge and information can be digitized and transmitted electronically.[2] They are transforming learning and teaching, and the everyday lives of academics and students. As Nicholas Carr wrote in *The Shallows: What the Internet Is Doing to Our Brains*, "the future of knowledge and culture no longer lies in books ... or records or CDs. It lies in digital files shot through our universal medium at the speed of light".[3]

27. Information and communications technologies[4] are used to access digital content (the digital versions of analogue originals, such as scanned textbooks). Increasingly, content is being designed for digital use. Online education materials and courses, e-textbooks and video and audio files streamed on the Internet, as all of which are modes of e-learning,[5] are revolutionizing the provision of education. Broadband services[6] and information and communications technologies can play a fundamental role in making

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[1] UNESCO defines "digitization" as the creation of digital objects from physical, analogue originals by means of a scanner, camera or other electronic device (see www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/mow/digitization_guidelines_for_web.pdf). Digital content involves the creation, sharing and accessing of content in digital forms, including online courses, videos, digital libraries and texts, games and applications. In the area of education, such content is moving from static reproductions of textbooks and learning materials towards interactive education software and online learning products.

[2] Susan D'Antoni, ed., *The Virtual University: Models and Messages — Lessons from Case Studies* (UNESCO, Paris, 2006), p. 51.

[3] Nicholas Carr, *The Shallows: What the Internet Is Doing to Our Brains* (W.W. Norton and Co., New York and London, 2010), p. 41.

[4] "Information and communications technologies" is an umbrella term that includes any communication device or application, including radio, television, cellular telephones, computers, network hardware and software, satellite systems and the various services and applications associated with them, such as videoconferencing and distance learning (see http://searchcio.techtarget.com/definition/ICT-information-and-communications-technology-or-technologies).

[5] OECD defines "e-learning" as the use of information and communications technologies to enhance and/or support learning in tertiary education, whether provided online, using computers or any other tool that enables distance learning. See OECD, "E-learning in tertiary education" (2005).

[6] The term "broadband" refers to multiple aspects of network services, including high-speed access to the Internet and/or the services and applications available through broadband networks. See http://broadbandtoolkit.org/1.2.

knowledge, information and education accessible and in supporting the development of new skills.[7]

28. The digital revolution is taking place at a dazzling rate,[8] as digital devices multiply learning pathways and diversify learning approaches.[9]

29. Many countries and universities are keen to embrace the potential of information and communications technologies, as the Special Rapporteur witnessed during his recent visit to Fiji. A key element in the discussion of the implications of digital technology for educational institutions is the notion that universities no longer hold a monopoly on knowledge, as new actors, such as for-profit education institutions and other private providers, enter the field.

30. Massive open online courses provide an alternative path to higher education. Many universities worldwide are now offering online courses, either alone or in conjunction with a massive open online course provider. Many enthusiastic promoters of knowledge societies, networking and lifelong learning can dream today of a world converted into a giant classroom in which there are a few powerful global teachers and millions of assimilators of information and knowledge packages through the Internet. Similarly, open educational resources[10] can harness the new possibility afforded by digital technology to address common educational challenges. As a result, the landscape of higher education is undergoing rapid transformations.

IV. The digital divide

31. In spite of progress made, there are still inequalities in higher education, particularly in developing and least developed countries.[11]

32. In the 2030 Agenda for Sustainable Development, States recognized the importance of the spread of information and communications technologies and global interconnectedness, and stressed the need to bridge the digital divide and to develop knowledge societies.[12]

33. In the 1988 World Declaration on Higher Education for the Twenty-First Century: Vision and Action, the potential and the challenges of information and communications technologies were addressed, with a focus on quality and high standards and concern for

[7] Broadband Commission for Digital Development, *The State of Broadband 2014: Broadband for All* (Geneva, 2014), chap. 4.

[8] John Morgan, "Universities challenged: the impact of digital technology on teaching and learning", Educational Innovation Position Paper (September 2013), p. 13.

[9] UNESCO, *Leveraging Information and Communication Technologies to Achieve the Post-2015 Education Goal: Report of the International Conference on ICT and Post-2015 Education* (2015), p. 5.

[10] "Open educational resources" is a term that was coined at the UNESCO 2002 Forum on the Impact of Open Courseware for Higher Education in Developing Countries. It is defined as "teaching, learning and research materials in any medium, digital or otherwise, that reside in the public domain or have been released under an open license that permits no-cost access, use, adaptation and redistribution by others with no or limited restrictions" (see the 2012 Paris Open Educational Resources Declaration). See also OECD, *Open Educational Resources: A Catalyst for Innovation* (2015).

[11] "Online, open and flexible higher education for the future we want: from statements to action — equity, access and quality learning outcomes", message adopted at the global high-level forum held in Paris from 9 to 11 June 2015. Available at www.icde.org/assets/WHAT_WE_DO/POLICY/parismessage13072015final.pdf.

[12] General Assembly resolution 70/1, para. 15.

inequalities. Institutions of higher education using information and communications technologies to modernize their work should make sure they do not transform themselves from real into virtual institutions.

A. Disparities in access to the Internet and digital technology

34. Digital technologies are ubiquitous only in principle; in real life, their presence is fractured by the digital divide.

35. Statistics from the International Telecommunication Union[13] show that, despite impressive growth overall, developing countries continue to lag behind. In 2015, 34 per cent of households in developing countries and only 7 per cent of those in the least developed countries had Internet access, compared with more than 80 per cent in developed countries, creating a global average of 43 per cent. In Africa, one in five people use the Internet, compared to almost two in five people in Asia and the Pacific and three in five people in the Commonwealth of Independent States.[14] The fundamental challenge is making access to learning and educational resources through the Internet more equal among countries, but also making equal the capacity to supply such education.[15]

B. Infrastructure constraints

36. One of the barriers that must be addressed relates to the cost of investing in information and communications technologies. The technological infrastructure, along with the software, the technical support, educator training, and maintenance, requires significant financial support from the State. Digital devices are not always affordable in the developing world, neither to students nor to public educational establishments. The high costs of digital technology are causing universities to establish consortiums to share resources, costs and infrastructure.

37. Technology in education provides important benefits but it can also impair the right to education. While a digital device-based education can bring advantages in the form of access to a computer or electronic device, when students or schools lack the financial means to obtain access, they fall behind. When only some schools are provided with technology, or when private schools can afford better technology, existing social divisions in education outcomes will increase.

38. In this respect, it is important to note that States are responsible, under international human rights law, for providing resources for the realization of the right to education. Recognizing education as a foundation of human development, Governments must devote maximum public funds to education as a matter of norm. For budgets to be allocated to education on a firm and enduring basis, a legal framework providing sustainable political and financial support is crucial. Massive open online courses should not be used by Governments to reduce public funding and cut instructional costs.

C. Marginalization and exclusion

39. The use of digital technology risks creating divisions within society. Devices such as computers, tablets and smartphones, and broadband services, are required to access the

[13] See www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2015.pdf.
[14] Ibid.
[15] Susan D'Antoni, ed., *The Virtual University: Models and Messages*, p. 45.

Internet. People in urban areas receive access of better quality first, leaving those in remote areas disadvantaged or cut off. Reliable access to electricity to charge devices is often a problem in the developing world.

40. Information and communications technologies can result in educational deprivation, particularly for the poor. Special attention must be paid to questions related to access and skills for the most marginalized groups, including girls and women and persons with disabilities. The guiding principle must be to adopt an all-inclusive approach.[16]

41. Provision of education through digital technology may also contribute to gender disparities. Currently, in developing countries, males are far more likely than females to own and use information and communications technologies. In low-to-middle-income countries, 25 per cent fewer women than men have Internet connectivity, and this gap rises to nearly 50 per cent in some parts of sub-Saharan Africa.[17]

42. Children with disabilities face several barriers in accessing information and communications technologies, as they may need adaptive technologies to use computers, tablets and mobile telephones. Moreover, online digital content may need to be converted into another format. Children in developing countries who do not attend schools rarely have access to computers.

43. The signatories to the declaration[18] adopted at the International Conference on Information and Communications Technologies and Post-2015 Education, held in Qingdao, China, affirmed their collective understanding of how to unleash the full potential of information and communications technologies for education and for achieving the Sustainable Development Goals. They also reaffirmed their commitment to the Incheon Declaration and the Education 2030 framework for action and to the use of technology to strengthen access to and inclusion in education.

V. Digital technologies and norms and principles of the right to education

44. The application of technology to education must always be conducted in conformity with the right to education. It is important to ensure that the principles and norms of the right to education are preserved when using information and communications technologies. Universal access is an essential prerequisite for the full exercise of the right to education. Under a number of international conventions establishing the right to education, States have international obligations to provide primary education at no cost. They also have the obligation to make secondary education, including technical and vocational education, generally accessible; higher education should be made accessible, on the basis of merit or capacity. Education at all levels must be made, progressively, accessible to all.

45. The Special Rapporteur recalls that, as equality of opportunity in education is a principle underlying all human rights conventions, it must be respected. The framework for action for the implementation of the Incheon Declaration contains a commitment by

[16] Statement endorsed by participants in the special session of the Broadband Commission for Sustainable Development held in Davos, Switzerland, on January 2016. Available from www.broadbandcommission.org/Documents/publications/davos-statement-jan2016-en.pdf.

[17] *Bridging the Gender Gap: Mobile Access and Usage in Low- and Middle-Income Countries* (2015). Available from www.gsma.com/connectedwomen/wp-content/uploads/2015/04/GSM0001_03232015_GSMAReport_Executive-Summary_NEWGRAYS-web.pdf.

[18] See http://unesdoc.unesco.org/images/0023/002333/233352E.pdf.

Governments to make tertiary education progressively free, in line with existing international agreements.

46. In the Convention on the Rights of the Child, in particular article 28, States parties recognized the need to achieve the right to education progressively and on the basis of equal opportunity. Specifically, they committed to promoting and encouraging international cooperation in matters relating to education, in particular with a view to facilitating access to scientific and technical knowledge and modern teaching methods. In article 24 of the Convention on the Rights of Persons with Disabilities, States parties recognized the right of persons with disabilities to education and committed to ensuring an inclusive education system at all levels. They also committed to taking appropriate measures to train professionals in disability awareness and the use of augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

47. States parties to the Convention on the Rights of Persons with Disabilities further committed to taking appropriate measures to promote access for persons with disabilities to new information and communications technologies and systems, including the Internet, and to promoting the design, development, production and distribution of information and communications technologies accessible to persons with disabilities.

VI. Challenges to quality and issues relating to the recognition of degrees and diplomas

48. The use of digital technologies poses multiple challenges regarding quality in education. The Special Rapporteur would like to outline some critical concerns in need of a policy response.

49. One of the main challenges for higher education today is how it can respond to the massive global demand for professional qualifications while maintaining its key role in research. This must be seen in the context of the online provision of education.

50. There is no real or conclusive evidence that online learning leads to better learning outcomes for students.[19] A recent study by the Organization for Economic Cooperation and Development (OECD) has found that over the past 10 years there has been no appreciable improvement in student achievement in reading, mathematics or science in countries that have invested heavily in information and communications technologies for education.[20] These findings must worry policymakers and Governments that hope to find salvation in expensive technological purchases.

51. Serious questions are being raised regarding the quality of education provided through online courses, particularly massive open online courses. Most participating students already have a university degree, raising the question of whether such programmes are increasing access or equity in education. A 2013 survey found that as few as 7.5 per cent of students were completing courses.[21] The quality of massive open online courses, which essentially involve self-study and lack the structure of other online courses, is particularly worrying. Teaching methods have been criticized as outdated because most of

[19] John Morgan, "Universities challenged", p. 12.

[20] OECD, *Students, Computers and Learning: Making the Connection* (Paris, 2015). Available from www.oecd.org/publications/students-computersand-learning-9789264239555-en.htm.

[21] Steve Kolowich, "The professors who make the MOOCs", *The Chronicle of Higher Education* (18 March 2013). Available from http://chronicle.com/article/The-Professors-Behin -the-MOOC/137905/#id=overview.

these courses still rely on information transmission, computer-marked assignments and peer assessment.[22]

52. The emerging trend of giving qualifications through massive open online courses for distance learning is concerning, as many of the usual modalities of university instruction and assessment are lacking. Often, students enrolled in massive open online courses are not assessed, or are inadequately assessed, and are not given certificates. Although institutions have started to award credits for massive open online courses and novel forms of certifications such as badges are being introduced, these are still seen as an inferior form of educational outcome and an inadequate indication of the quality of learning. Such criticisms may be more relevant to universities in the global North.[23]

53. A large number of private providers specialize in areas such as management, marketing, accountancy and communication and award diplomas and degrees that are devoid of equivalence or validity. There is also a risk of fraud associated with the awarding of online degrees. Online or distance education providers often operate from locations with no controls at all, and offer their own degrees, free from regulation. Public authorities must find ways of preventing underqualified or fraudulent providers from trading as universities and from issuing worthless qualifications when the providers are based overseas and operate through the Internet.[24]

54. The Special Rapporteur recognizes the importance of the ongoing work of UNESCO in preparing a global convention on the recognition of higher education qualifications.[25] He hopes that it will address the issue of fake degrees by online providers of education and that it will contain provisions as regards qualifications and certificates issued upon completion of online courses. Moreover, it is important to look into the range of issues arising from the awarding of degrees and diplomas by virtual universities, which lack face-to-face teaching and learning.

VII. Importance of face-to-face learning and the role of teachers

55. The autonomy of teachers to teach as they deem best can be hampered by technology-based education models. From scripted tablet-based learning to massive open online courses with prescribed teaching modules, the ability of teachers to select content that they feel is relevant for their local conditions and classes is being impaired.

56. Education should be tailored to the needs of students and the local context. It has been noted that massive open online courses reflect an overwhelmingly Western, Anglo-American method based on a particular academic experience, knowledge base and pedagogical approach.[26] The vast majority of courses are offered in English, which by definition cannot be sensitive to the local values and cultures of all countries.

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[22] Tony Bates, "What's right and what's wrong about Coursera-style MOOCs" (5 August 2012). Available from www.tonybates.ca/2012/08/05/whats-right-and-whats-wrong-about-coursera-style-moocs.

[23] Michael Trucano, "More about MOOCs and developing countries (12 November 2013). Available from http://blogs.worldbank.org/edutech/moocs-developing-countries.

[24] John Fielden and N.V. Varghese, "Regulatory issues", in *A New Dynamic: Private Higher Education*, Svava Bjarnason and others, eds., (UNESCO, Paris, 2009), pp. 71-89.

[25] See http://unesdoc.unesco.org/images/0023/002352/235261e.pdf.

[26] Education International, statement on massive open online courses made available at http://ei-ie.typepad.com/files/ei_policy_statement_moocs_2014.pdf.

57. Academic freedom includes the right to teach without any interference, including the right to choose the content and methods of teaching and the freedom to use or not to use any specific technique or technology.

58. In the light of the rise of online and web-based learning, the Special Rapporteur considers it important to recognize the limits of the pedagogical value of technology-based and distance education, putting a premium on face-to-face learning and human interactions in education. All forms of online education may help increase access to higher education, but only if they are a supplement to, and not a replacement for, proven pedagogical practices. Very high enrollment rates for massive open online courses are offset by their extremely low completion rates, which traditional face-to-face teaching does not suffer from.

59. The introduction of technology in the classroom does, however, have an important impact on the role of the teacher. Electronic materials should complement the existing classroom practices, as videos or online exercises supplement traditional learning. Through face-to-face interactions the teacher can more easily gauge the level of understanding and participation of learners and implement interventions to address issues.[27]

60. The current implementation of massive open online courses seems to focus more on content dissemination and rather less on learner engagement and interaction. This concern is consistent with the recent discussion within the research community regarding the approaches needed to make massive open online courses more interactive, social and personalized.[28]

61. In digital classrooms, the teacher remains responsible for selecting and developing the curriculum. Guidance, attention and commitment are necessary for student-centred learning.

VIII. Preserving human values in digital technology

62. There are critical questions relating to human values and the education system. For example, the Committee on the Rights of the Child has expressed concern about the risks that access to the Internet, whether at school or at home, pose for children.

63. The negative impact of information and communications technologies on the quality of learning, as well as on the mission of universities as the seat of learning, must be taken into consideration. Without diversified sources, massive open online courses can reinforce a monolithic education system. A greater proportion of students are reading less, referencing less and writing with less clarity and boldness. Students rely on the Internet rather than on referred course readings for research material. The popularity of Google is facilitating laziness, poor scholarship and compliant thinking.[29] The Internet seems to be chipping away at students' capacity for concentration and contemplation.[30] Use of the Internet and digitalization places the focus on application rather than on contemplation.[31]

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[27] Leila Goosen and Dalize Van Heerden, "E-learning management system technologies for teaching programming at a distance", *Proceedings of the International Conference on e-Learning* (2015), pp. 116-126.

[28] UNESCO, *Leveraging Information and Communication Technologies to Achieve the Post-2015 Education Goal*, p. 28.

[29] Tara Brabazon, *The University of Google: Education in the (Post) Information Age*, cited in John Morgan, "Universities challenged", p. 16.

[30] Nicholas Carr, *The Shallows*, p. 13.

[31] Susan D'Antoni, ed., *The Virtual University*, p. 53.

64. Concern has been expressed regarding the negative impact of digitization, for example regarding the "reordering of education institutions in line with the logical network" and with respect to network time as a "chronic distraction".[32]

65. Nicholas Carr provides profound insights into the deleterious impact of digital devices on our mind and spirit, and sheds light on how this scuttles humanist values in education: "How sad it would be, particularly when it comes to the nurturing of our children's minds, if we were to accept without question the idea that 'human elements' are outmoded and dispensable." Meditative thinking, the very essence of our humanity, might become a victim of this.[33]

IX. Fostering the humanistic mission of education

66. In the Qingdao declaration, the challenge of realizing the potential of digital technologies within a humanistic framework was identified.[34]

67. Full development of the human personality is the primary objective of education, as laid down in international human rights conventions. The four pillars of education — learning to know, learning to do, learning to live together and learning to be — propounded by the International Commission on Education for the Twenty-First Century in its 1996 report *Learning: the Treasure Within*, continue to be important. Higher education is a public good and a public service, and massive open online courses should not be used to weaken public provision of education or promote the privatization and commercialization of public education.[35]

68. Universities, as the moral seat of learning, must foster the common human values so much in need today, in the face of the challenges of globalization. Fostering the humanistic mission of education is of paramount importance to counter the trend towards the pursuit of material values and a merely instrumental role for education. This is critically important, as the humanistic mission of education is being vitiated.

X Risks of digital education

69. Misuse of technology can lead to cyberbullying, criminal activity and even to terrorism. Educators must prepare their students to face new risks. The need to protect children from the potentially harmful effects of online content has been underlined by the Committee on the Rights of the Child. Most serious is the risk of sexual abuse or exploitation, but less serious risks include advertisements, spam, sponsorship, disclosure of personal information, and content that is aggressive, violent, hateful, biased, racist, pornographic, unwelcome and misleading.[36] The State must take measures to protect children from online harassment, including bullying or "grooming" for sexual purposes. Finally, care must be taken to ensure children do not become involved in illegal activities, financial scams or terrorism.[37]

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[32] John Morgan, "Universities challenged", p. 18.

[33] Nicholas Carr, *The Shallows*, p. 87.

[34] "Online, open and flexible higher education for the future we want".

[35] Education International, statement on massive open online courses.

[36] See Committee on the Rights of the Child general comment No. 13 (2011) on the right of the child to freedom from all forms of violence, para. 31.

[37] Ibid.

70. In its resolution 55/63, the General Assembly expressed concern that technological advancements have created new possibilities for criminal activity, in particular the criminal misuse of information technologies, and noted the value of making the general public aware of the need to prevent and combat the criminal misuse of information technologies. Education plays an important role in raising awareness on the issue.

XI. Digital technology and copyright law

71. Digital education, in all its forms, relies on teaching materials, textbooks and other forms of transmitting information that are subject to copyright law.

A. Copyright issues

72. It is important to look into intellectual property rights and the use of digital technology in education and learning, bearing in mind the 1971 Berne Convention for the Protection of Literary and Artistic Works, the 1994 World Trade Organization Agreement on Trade-related Aspects of Intellectual Property Rights and the 1951 UNESCO Universal Copyright Convention, among other international treaties.

73. The Special Rapporteur is concerned, however, that exceptions to copyright law exist that allow for the free use of materials in education. Digitizing content does not change the intellectual property rights of the owners of the original materials, which must be respected and maintained.[38]

74. Currently, most massive open online course providers establish a proprietary claim on material included in their courses, license the access and use of that material to the user and exercise ownership over user-generated content. To fully exercise academic freedom, however, higher education teaching personnel should retain ownership of their course material, including material used in distance and online courses.[39]

75. In the digital marketplace, publication becomes an ongoing process rather than a discrete event, and revision can go on indefinitely.[40] Higher education teaching personnel should retain intellectual property rights over course material, no matter the mode of delivery.

76. The private interest of the copyright holder must be respectful of the broader social interest of the public. The public importance of education outweighs the value of allowing copyright holders to seek a profit. This principle is reflected in a number of exemptions to copyright law. The 1971 Appendix to the Berne Convention for the Protection of Literary and Artistic Works sets out special provisions for developing countries that include challenging procedural requirements.[41]

77. There is no human right to seek a profit, and the public interest in respecting the right to education must take priority in public policies, nationally and internationally. States should update their copyright treaties and legislation to allow all public educational institutions to have free access to all information used for educational purposes.

78. Proprietary standards from private companies are being promoted worldwide as a simple panacea to meet the information and communications technology objectives of

[38] http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/mow/digitization_guidelines_for_web.pdf.

[39] Education International, statement on massive open online courses.

[40] Cited in Nicholas Carr, *The Shallows*, p. 47.

[41] See, in particular, art. III (3) (i) of the Appendix.

Governments. Yet, such solutions create multiple levels of risk. States must take particular care when implementing information and communications technology programmes in education so as to recognize the risks that emerge from selecting proprietary providers of hardware, software and education materials.

79. Persons with disabilities, particularly those who cannot make use of print media, are denied access to information and cultural life when copyright laws prevent them from converting media to other formats. The use of Braille printers, text readers or digitalization aides to convert print media into accessible formats amounts to illegal copying, unless exceptions are created in national laws. While exceptions have been created by some countries, a general exception allowing texts to be converted for the purposes of accessibility should be made a general principle of copyright law.

80. The Accessible Books Consortium (a multi-stakeholder partnership comprising the World Intellectual Property Organization, organizations that serve people with print disabilities and organizations representing publishers and authors) is converting books into formats to make them available to people who are blind, have low vision or are otherwise print disabled. Such partnerships should be encouraged to ensure human rights in education are met.

81. The Committee on the Rights of the Child has called[42] upon States to establish copyright exceptions that benefit children with visual or other impairments, reinforcing the obligation set out in article 30 of the Convention on the Rights of Persons with Disabilities for States to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.

82. The Special Rapporteur urges States to ratify and implement the 2013 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, which calls for the creation of copyright exceptions in national legislation to ensure the accessibility of published works, in any media, for blind, visually impaired or otherwise print-disabled persons.

B. Open licensing frameworks

83. Copyright law reserves all rights to the author or owner and requires either legislative or licensed exceptions to be set out in an agreement. On the other hand, open licensing allows authors to publish their work for anyone to share and use, while still allowing them to reserve more rights if they choose.

84. In order to create a standardized and widely recognized open licensing framework, the non-profit organization Creative Commons developed a series of standardized copyright licenses. Creative Commons encourages copyright owners to license the use of their material through open content licences. These will allow for better identification, negotiation and use of their content for the purposes of creativity, education and innovation. By minimizing copyright licensing efforts and complexity, authors can ensure their work is rapidly and easily used.[43]

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[42] See Committee on the Rights of the Child general comment No. 16 (2013) on State obligations regarding the impact of business on children's rights.

[43] Berkman Center for Internet and Society, Harvard Law School, "The digital learning challenge: obstacles to educational uses of copyrighted material in the digital age". Available from http://cyber.law.harvard.edu/media/files/copyrightandeducation.html.

C. Open educational resources

85. Open educational resources are teaching, learning and research resources that reside in the public domain or have been released under an intellectual property licence that permits others to use them freely and for different purposes.

86. First discussed at the UNESCO Forum on the Impact of Open Courseware for Higher Education in Developing Countries, held in Paris from 1 to 3 July 2000, open educational resources are understood to be all teaching, learning and research materials in any medium, digital or otherwise, that reside in the public domain or have been released under an open licence that permits no-cost access, use, adaptation and redistribution by others with no or limited restrictions. Open licensing is built within the existing framework of intellectual property rights as defined by relevant international conventions and respects the authorship of the work.[44]

87. Open educational resources capture the idea that knowledge is a public good that shou'd be freely shared by all and not restricted for private profit. This concept was further developed at the World Open Educational Resources Congress, held in Paris from 20 to 22 June 2012, on which occasion the 2012 Paris Open Educational Resources Declaration was adopted. The signatories to the Declaration called upon States to support, promote and make greater use of open educational resources.

88. A number of initiatives and foundations support the development and dissemination of open educational resources. The Open Educational Resources Commons provides access to digital learning materials for all levels of education in English. Teaching materials and textbooks for all subjects are available for pre-primary to secondary schools, as well as for university courses and adult education. The Open Education Consortium is a non-profit global network of educational institutions, individuals and organizations that collaborate and develop open educational materials, including textbooks and courses in 26 languages, particularly in the sciences and technology. The UNESCO Institute for Information Technologies in Education acts as a as a centre of excellence and provider of technical support and expertise in the area of information and communications technology usage in education.

XII. Digital technologies and the forces of privatization in education

89. Digital technologies necessarily involve private partners and agencies that collaborate with universities, both public and private, on the procurement and operationalization of not only hardware but also software. The use of digital technologies in education has led to more consumer-oriented attitudes in universities and is resulting in the commodification of knowledge and the valuing of information in economic terms rather than for its social and cultural significance. Sponsored by a range of entities, including individual proprietors and profit-seeking businesses, private institutions of higher education now constitute the fastest-growing segment of higher education. Corporate funding of higher education raises questions of academic independence, as well as ethical questions. Universities are moving away from their social function. The commercialization of education could divert attention away from the classical type of higher education by accumulating advantages in the most advanced countries and institutions, by discriminating

[44] 2012 Paris Open Educational Resources Declaration. See also OECD, *Open Educational Resources: A Catalyst for Innovation*.

against the most deprived and by contributing to brain drain in many poor countries.[45] There is evidence of an emerging global marketplace and a growing spirit of competition in higher education.[46]

90. Massive open online courses and other distance education formats can promote privatization, reduce public funding and increase managerial control over academic staff.[47] "Market-leading" universities could capture the higher education market as a whole, since customers will choose the most prestigious courses in elite universities associated with "star" professors.[48] This phenomenon has been termed "an emerging brand of academic capitalism"[49] that is associated with entrepreneurship, as it seeks to raise significant income from the private sector.

91. Private sector enterprises are emerging key players in digitization.[50] The commercial interest of providers, which enables them to enter the higher education market using a massive open online course approach, can be the reason for offering such courses. Governments, institutions and private providers may misuse massive open online courses and other distance education technologies to promote privatization, reduce public funding and increase managerial control over academic staff.

92. Recalling the report he submitted to the General Assembly at its seventieth session, in which he expressed concern regarding the risks of public-private partnerships and the right to education, the Special Rapporteur calls upon Governments to be vigilant against commercial pressures that promote the sale of technology without due concern for the actual benefits of students or teachers, educational establishments and the education system at large. Governments should seek evidence of the value of any investment into digital technologies before diverting resources from the education sector. This is critically important as growing interest is being manifested today in seeking partnerships with multiple stakeholders. The Special Rapporteur emphasizes that Governments and, through them, all providers of education, whether operating independently or jointly with Governments, remain accountable given that States bear responsibility for ensuring respect for the right to education in all partnerships.

93. The norms and principles that underlie the right to education are affected by the market forces associated with digital technologies. It is of utmost importance that education be safeguarded against the forces of privatization.

XIII. Legal and policy responses to cope with the digital revolution

94. The "digital tsunami" is so powerful that legal and policy responses are not able to keep pace with it. The need for and the importance of digital technologies not only as tools but also as resources in teaching and learning processes and in creating immense possibilities of connections and collaboration must be recognized. Governments need to break down barriers to open information, eliminate digital divides and expand usage and coverage of digital services. They must optimize regulations and public policies and

[45] Susan D'Antoni, ed., *The Virtual University*, p. 45.
[46] Ibid., p. 52.
[47] Education International, statement on massive open online courses.
[48] John Morgan, "Universities challenged", p. 6.
[49] Ibid., p. 7.
[50] For example, two leading United States universities, Harvard University and the Massachusetts Institute of Technology, have collaborated with two companies, Udacity and Coursera, to form partnerships and build massive open online courses under the name edX. See John Morgan, "Universities challenged", p. 6.

enhance the governance of the Internet to ensure the safe, equal and healthy application of information and communications technologies.[51]

95. The Special Rapporteur refers to the declaration adopted at the sixth BRICS summit, held in Fortaleza, Brazil, from 14 to 16 July 2014, in which the signatories agreed that the use and development of information and communications technologies through international cooperation and universally accepted norms and principles of international law is of paramount importance in order to ensure a peaceful, secure and open digital and Internet space.[52]

Enabling environment

96. Public policies should give consideration to the creation of an enabling policy environment for drawing upon digital technologies that can serve as valuable tool in the delivery of education. For instance, in order for open educational resources to be available and effective, laws and policies that facilitate and encourage their use are necessary.

97. Polices should foster interactive education software, open access digital libraries and new forms of interaction between students, teachers, others employed in education and the community that can enrich education by integrating such technologies into traditional classroom activities. Such policies should, however, be designed in such a way as to ensure that these new technologies are used as supplements to and not as replacements for in-class instruction.[53]

98. Enabling policies and a sound regulatory environment are necessary to promote the development of local and relevant content and services and to increase understanding of the impact of Internet access in terms of sociocultural developments.

99. Gaining the resources for digital technologies will inevitably involve private providers such as network operators, content providers and other stakeholders. Massive open online courses can involve creating partnerships between educational institutions in developed and developing countries, Governments, development agencies and the private sector. It is when Governments establish fundamental principles and a clear policy framework that the private sector can be involved in the provision of relevant products and services.[54]

100. The use of digital technologies in education must be in full accordance with the right to education. Such use must increase access, not limit it. It must promote equity, not exacerbate existing disparities in society. It must eliminate discrimination, not create new barriers. It must improve the quality of education, not undermine it.

XIV. Regulatory framework

101. In order to take advantage of the many opportunities associated with open educational resources and online learning in general, standards and quality assurance mechanisms need to be agreed and adopted, especially for monitoring, measuring and

[51] John Morgan, "Universities challenged", p. 8.

[52] See http://brics.itamaraty.gov.br/media2/press-releases/214-sixth-brics-summit-fortaleza-declaration.

[53] See the resolution on the use of information and communications technology adopted at the seventh World Congress of Education International, held in Ottawa from 22 to 26 July 2015.

[54] UNESCO, *Leveraging Information and Communication Technologies to Achieve the Post-2015 Education Goal*, p. 12.

validating learning outcomes. Policies regulating the development and use of these resources should be designed to add value to existing education policies and to contribute to meeting education goals, rather than to function as isolated, additional policy documents.[55]

102. An area that poses stupendous challenges is that of controlling online or correspondence providers, many of which operate from locations with no controls at all and offer their own awards, free from regulation. Public authorities must find ways of preventing underqualified or fraudulent providers from acting as universities and from issuing worthless qualifications, including in situations where providers are based overseas and operate through the Internet.

103. A regulatory framework is necessary since an unregulated free market in higher education may lead to investments in the sector by low-quality providers. Governments must regulate fraudulent practices and ensure that fake degrees are not awarded. A regulatory framework is thus of critical importance in setting out responsibilities and accountability requirements.[56] Regulations must reflect a broad humanistic notion of education and ensure that the digitization of education is subservient to public interest.

104. The Special Rapporteur makes recommendations regarding prescriptive, prohibitive and punitive regulations on the use of digital technology in education with a view to ensuring that the right to education is adequately protected.

A. Prescriptive regulations

105. Prescriptive regulations are necessary to ensure that digital technologies supplement rather than supplant campus-based face-to-face teaching and learning. The use of information and communications technologies should not be detrimental to the social function of universities or undermine their core mission as the moral seat of learning.

B. Prohibitive regulations

106. Prohibitive regulations are necessary to ensure that fraudulent practices, for example in the online delivery of education, and any attempt to commercialize education are not allowed. Governments should prohibit all commercial advertising and propaganda on the virtues of information and communications technologies that are detrimental to basic human values and ban any portal or website facilitating pornography, violence, cybercrime, terrorism and any other crime.

C. Punitive regulations

107. Punitive regulations are required to address fraudulent practices, including the awarding of fake degrees and diplomas. It is important that corrupt and fraudulent practices be investigated and that operators who act illegally be prosecuted.

[55] Ibid., p. 33.

[56] See http://campaignforeducation.org/en/news/global/view/623-representatives-from-91-countries-come-together-for-the-fifth-gce-world-assembly.

XV. Conclusions

108. **Digital technologies are revolutionizing the provision of education. Multiple learning pathways, such as e-learning, massive open online courses and open educational resources, are contributing to the diversification of learning approaches. Disparities in access to digital technologies persist, however, and countries need to bridge the digital divide. Marginalization and exclusion compromise the principles of social justice and equity, which are key pillars of the United Nations system's work on peace and development.**

109. **In the 1998 World Declaration on Higher Education for the Twenty-First Century: Vision and Action, signatories called upon higher education institutions to give the opportunity to students to fully develop their own abilities with a sense of social responsibility, educating them to become full participants in democratic society and promoters of changes that will foster equity and justice.**

110. **The use of digital technologies carries the risk of undermining human values in education and the quality of education, especially as regards degrees and diplomas that are fraudulently delivered.**

111. **Moreover, the implications of digital technologies and copyright must be examined critically in order to better understand the rights to access to knowledge and information.**

112. **Digital technologies are negatively affecting the cause of education by impairing the ability of students to contemplate and think critically, by scuttling human values in education and by paving the way for the commodification of education.**

113. **In the light of their obligations under the norms and principles of the right to education, States must ensure that digital technologies do not impair universal access to education or equality of opportunity in education. Nor should they be allowed to erode the concept of education as a public good.**

114. **Governments must learn from the lessons of the past, when technologies were purchased without due consideration being given to the many factors that contribute to success. Computers and tablets alone make no difference in learning outcomes if teachers and administrators of educational establishments have not been involved in planning and have not received adequate training to effectively use the technology in the classroom.**

115. **The Special Rapporteur recalls that the Education 2030 framework for action specifically calls upon Governments to harness information and communications technologies to promote quality and effective learning. It also recognizes the importance of education as a public good.**

116. **In the face of the transformation of education systems, especially higher education, through digital technologies, the State remains primarily responsible for respecting and protecting the right to education on account of its international legal obligations. The State is the custodian of norms and principles and must ensure that the right to education is respected in all systems and modes of education. Governments should not abdicate their responsibility for ensuring that educational institutions retain their essential public service function. In all circumstances, the State must discharge its responsibility as guarantor and regulator of education as a fundamental human right.**

XVI. Recommendations

117. **In the light of the above, and taking into consideration the challenges that digital technologies pose to the right to education, the Special Rapporteur offers the recommendations set out below.**

State responsibility for protecting and safeguarding the right to education

118. **While recognizing the importance of opportunities arising from the use of information and communications technologies, States should not forget to look into the downside of such use and the impact of the digital divide on the education system and, in particular, on those who remain marginalized, on the future generation and on society at large.**

A rights-based approach to digital technologies

119. **States should address issues of access, quality and equity in the use of digital technology in education and ensure that students' right to education is exercised in an equitable manner and that it is fully respected. There is a great risk that technology will widen inequalities in society if an equitable approach to its use is not adopted. State obligations for respecting, protecting and fulfilling the right to education should be a priority concern.**

Bridging the digital divide

120. **All States have the responsibility to achieve the right to education progressively and to the maximum extent of their resources. Implementation strategies must take into account the Sustainable Development Goals and the obligations on the right to education. Disaggregated indicators and annual reports must indicate whether investments are improving the education outcomes of students or creating unintended negative outcomes that require remedial action.**

Safeguarding education from the forces of privatization

121. **The forces of privatization behind the spread of digital learning and education creating a marketplace in education must be exposed through public debate so as to prevent the commoditization of education. The corporate sector should not impinge upon the function and autonomy of education.**

122. **Public authorities should ensure that the use of digital technologies is considered as a means of education, not as a substitute for face- to-face education. They should recognize that human contact in education is essential to the teaching and learning process. Public authorities should also take the measures necessary to build the capacity of teachers to use digital technologies while retaining freedom in their pedagogic approaches. Teachers must have the competence and be free to adapt digital technologies to local contexts, and the authority to rearrange online teaching materials and methodologies to best serve the country's education requirements.**

Promoting open educational resources

123. **States should implement the recommendations contained in the 2012 Paris Open Educational Resources Declaration, recognizing their importance for strengthening the use of such resources while at the same time reducing the cost of education for the Government. High-quality textbooks, learning materials and online courses are important in education and, by sharing their development costs and**

promoting high-quality open resources, the savings can be invested in teacher training, school improvements and technology purchases.

Engaging Governments through the work of the United Nations human rights treaty bodies and the United Nations agencies

124. Within the scope of their respective mandates, when considering the right to education in their dialogue with States, the United Nations human rights treaty bodies should look into the use of information and communications technologies and its repercussions on the right to education. They should especially consider whether the downside of using such technologies is kept in view and policies are in line with human rights law and the internationally established framework for safeguarding the right to education while addressing the digital divide.

125. In the context of the universal periodic review mechanism of the Human Rights Council, critical attention should be given to digital technology and the right to education in the dialogue with States. Governments should be encouraged to take the measures necessary to safeguard the right to education, to maintain education as a public good and to take action whenever the right to education is compromised as a result of the application of digital technologies.

126. The obligation of States to provide inclusive, equitable, non-discriminatory education of a high quality for all must be carefully preserved in any implementation of digital technologies in education. The predominance of English in online education negatively affects the provision of education in other languages.

127. In the context of its ongoing work on the development of a global convention on the recognition of higher education qualifications, UNESCO could address the issue of the awarding of fake degrees and certificates and consider becoming a repository of all nationally recognized degrees and diplomas. UNESCO should also advise States to implement a national-level system of legal action against the awarding of fake degrees and diplomas and against fraudulent practices.

128. States should work towards creating an exception to copyright law, nationally and internationally, that permits developing countries to make use of any information or material for non-profit education purposes. Such an exemption would better balance the public interest in promoting and improving education in developing countries within the framework of a modernized international copyright framework. To this end, UNESCO, in collaboration with the World Intellectual Property Organization, should explore the possibility of creating an international open licensing framework for education resources, in consultation with stakeholders.

Engaging with parliamentarians

129. Parliamentarians play a vital role in developing laws and policies that promote the use of technology in the education sector. Legislation should explicitly protect the right to education, including in procurement legislation and commercial laws.

Encouraging and supporting civil society and non-governmental organizations

130. Governments should encourage civil society and non-governmental organizations to play a valuable role in engaging the public in debates on the impact of digital technology on the right to education, giving full consideration to the importance of access, quality and equity in education.

131. Civil society organizations and the intellectual community, as well as students, parents and community associations, should expose the negative effects of digital

technologies on the right to education, underlining, in particular, the essential objectives laid down in the Universal Declaration of Human Rights and international human rights conventions. They should voice their concerns about the need to safeguard human values in respect of the right to education in the face of digital modes of education. Their advocacy work to foster social justice and equity is valuable in countering market-based approaches promoting the use of technology in education. Research, events and expert consultations on the right to education in the digital age should be encouraged and supported.

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Report of the Special Rapporteur on the right to education on his mission to Fiji*

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on right to education, Kishore Singh, on his mission to Fiji from 8 to 15 December 2015.

In his report, the Special Rapporteur welcomes important reforms ushered in by the Government, along with national initiatives to overcome ethnic divides and to build a better Fiji for all. He reviews the legal framework of the educational system and progress made in improving access to, the quality of and equity in education, and considers financial support for education.

The report highlights disparities in education and other challenges relating to the provision of quality education. It analyses developments as well as constraints in the ambitious programme to strengthen the technical and vocational education and training sector.

The report concludes with a set of recommendations for strengthening national efforts to realize the right to education in Fiji.

* The present report was submitted after the deadline in order to reflect the most recent developments.

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Report of the Special Rapporteur on the right to education on his mission to Fiji**

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** Circulated in the language of submission only.

I. Introduction

1. The Special Rapporteur on the right to education, Kishore Singh, carried out an official visit to the Republic of Fiji from 8 to 15 December 2015, at the invitation of the Government.

2. During his visit, the Special Rapporteur met with Aiyaz Sayed-Khaiyum, Attorney General and Minister for Finance; Mahendra Reddy, Minister of Education, Heritage and Arts; Jioji Konusi Konrote, Minister for Employment, Productivity and Industrial Relations; Mereseini Vuniwaqa, Minister for Lands and Mineral Resources; and Naipote Katonitabua, Acting Permanent Secretary in the Office of the Prime Minister. He was received by the Parliamentary Commission for Social Affairs and met with representatives of the Human Rights and Anti-Discrimination Commission, the Chief Justice of Fiji, the Chief Registrar of the High Court of Fiji and members of the diplomatic community.

3. The Special Rapporteur had the opportunity to visit the University of the South Pacific. He visited technical institutions, as well as community and government schools, and met their management team, teachers and students in Suva, Lautoka and Sabeto. He met with several representatives from the international community and civil society, including representatives from the United Nations Development Programme, the United Nations Children's Fund, the World Food Programme, the International Labour Organization and numerous civil society organizations.

4. The Special Rapporteur expresses his gratitude to the Government of Fiji for its invitation and the full cooperation throughout his mission. He also extends his thanks to the Office of the United Nations High Commissioner for Human Rights, in Fiji and Geneva, and all those who took time to meet with him and share their experiences in the field of education.

II. General overview

5. The Republic of Fiji is comprised of 332 islands and 522 smaller islets in the South Pacific. Of those, more than 100 islands are permanently inhabited by a population of 880,000. The two largest islands are home to approximately 80 per cent of the country's population. The large island of Viti Levu accounts for over half of the country's land area and is where the capital, Suva, is located. Vanua Levu, which lies 64 km north of Viti Levu, is another large island. The population of Fiji is about 60 per cent iTaukei and 40 per cent of Indian descent. Nearly 99 per cent of iTaukei are Christian, and around 80 per cent of Fiji Islanders of Indian descent are Hindu.

6. Fiji recognizes three official languages: English, *Vosa Vaka-Viti* and Hindi. *Vosa Vaka-Viti* is spoken as either a first or second language by indigenous Fiji islanders. Fiji islanders of Indian descent speak a local variant of Hindi known as Fiji Hindi. English is widely used as a lingua franca in more populated areas.

7. Fiji is going through a historic period of transition, and has launched a national initiative to overcome ethnic divides and build a better Fiji for all, under the slogan "One nation, one Fiji". The Peoples' Charter for Change, Peace and Progress, adopted on 15 December 2008, is a landmark document which seeks to transform Fiji from a fragmented society into a culturally vibrant and united democratic nation that seeks peace and prosperity. The Charter expresses a shared vision and principles for building a better Fiji for all and for celebrating diversity. It reflects the concept of a common good, with respect for diverse cultural, religious and philosophical beliefs, and a people driven by a common national identity. The Government's commitment to promoting a multicultural

nation that respects all ethnicities and communities is intended to put an end to racial divisions through common shared values.

8. Under the new Constitution of Fiji, adopted in 2013, all citizens of Fiji are known as Fijians and have equal status and identity, which means that they are equally entitled to all rights, privileges, duties, benefits and responsibilities of citizenship.

9. Fiji celebrated a democratic election in 2014, which was aimed at developing a common national identity and promised to usher in an era of stability and progress.

III. Legal framework for the right to education

A. International obligations of Fiji

10. Fiji is State party to only a few international human rights instruments, including the Convention on the Rights of the Child[1] and its optional protocols, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It is a signatory but not yet a party to the Convention on the Rights of Persons with Disabilities.[2] Fiji has not yet signed or ratified other important international human rights conventions on the right to education, including the International Covenant on Economic, Cultural and Social Rights and the Convention against Discrimination in Education.

11. The Government has taken measures to better integrate its international human rights obligations into its domestic legal order and policymaking. In October 2012, the Government established the Fiji Human Rights Treaty Committee, co-chaired by the Ministry of Foreign Affairs and the Attorney General and composed of representatives of the Government and civil society. The Committee has as its primary task the development of a national human rights action plan, which will incorporate the country's obligations under international human rights treaties to which it is a State party into national law and policy. The Special Rapporteur is supportive of these efforts to mainstream human rights into government ministries and policymaking. In addition to strengthening the application of the right to education in national policies and institutions, this will also reinforce human rights for women, children and people in vulnerable situations.

12. Along with the international community, Fiji has also made political commitments to the 2030 Agenda for Sustainable Development, adopted by the General Assembly in its resolution 70/1. Goal 4, Target 4.1, of the Agenda stipulates that by 2030 Member States will "ensure that all girls and boys complete free, equitable and quality primary and secondary education leading to relevant and effective learning outcomes". Moreover, following the adoption in May 2015 of the Incheon Declaration: Education 2030—Towards inclusive and equitable quality education and lifelong learning for all, and the adoption in November 2015 of the Education 2030 Framework for Action on the occasion of the UNESCO General Conference, Fiji, along with countries all over the world, reaffirmed political commitments to attaining the goal of universal quality education for all free of cost. Building an inclusive education system is a main thrust of the future development agenda.

[1] Ratified on 13 August 1993.

[2] Signed on 2 June 2010.

B. Right to education and the national legal system

13. The 2013 Constitution of Fiji, in its article 31, enshrines the right to education, specifying that every person has the right to: (a) early childhood education; (b) primary and secondary education; and (c) further education. The same article also provides that "the State must take reasonable measures within its available resources to achieve the progressive realisation of the right (a) to free early childhood, primary, secondary and further education; and (b) to education for persons who were unable to complete their primary and secondary education". Article 26 affirms the right to equality and freedom from discrimination and provides that "every person has the right of access, membership or admission, without discrimination on a prohibited ground, to … education institutions".

14. The Constitution further provides that the teaching of conversational and contemporary *Vosa Vaka-Viti* and Fiji Hindi is to be compulsory in all primary schools (art. 31 (3)). It also reflects the State's human rights obligation with regard to financing education as a public function. Article 31 (5) states that "in applying any right under this section, if the State claims that it does not have the resources to implement the right, it is the responsibility of the State to show that the resources are not available".

15. Thus, the Constitution, as the supreme law of the land, contains several provisions of key importance concerning the right to education. These provisions are, however, not adequately incorporated into current education laws. The Education Act 1978, currently in force, does not adequately reflect the responsibilities of the State and the international legal obligations as laid down in international human rights conventions. The Act also lags behind the plans made in the Education Sector Strategic Development Plan for the period 2015-2018. Many of its provisions have been overruled either in practice or by administrative instructions. The Government is in the process of drafting legislation to replace the Education Act, but such legislation had not been enacted at the time of the present report.

16. Fiji has several other laws in the field of education, including the Examination Act, the University of the South Pacific Act, the Higher Education Promulgation of 2008, the Fiji Teachers Registration Promulgation of 2008, the 2009 Fiji National University Decree and the 2011 University of Fiji Decree.

IV. Education system in Fiji

17. Public education in Fiji is open to all students, regardless of their socioeconomic status or background. It is also integrated and inclusive, accepting students of all religions and backgrounds, and designed to accommodate children with disabilities. Finally, it is coeducational, with boys and girls studying together in schools.

18. The educational system of Fiji is divided into four sections: early childhood education, and primary, secondary and tertiary education.[3]

[3] Ministry of Education, National Heritage, Culture and Arts of the Government of Fiji, "Education for all: mid-decade assessment report" (UNESCO, 2008). Available from datatopics.worldbank.org/hnp/files/edstats/FJIefapr07.pdf.

A. Early childhood education, and primary and secondary education

19. Early childhood education is being progressively introduced throughout Fiji. Existing primary schools enrol 5-year-old students in kindergarten, while some faith-based or community-run schools enrol children as young as 3 years of age, while private day care is available in some areas for children aged 2-5. The Government reports that there are 1,066 registered kindergartens in the country, with 1,030 registered early childhood education teachers, 11 of whom are male. Of the total, 889 had received teacher training in early childhood care and education, while the rest had received some form of basic training in early childhood education. As of April 2016, there were 11,836 children enrolled in 526 kindergartens.

20. The early childhood education curriculum prioritizes teaching interpersonal skills, developing cultural and spiritual awareness, demonstrating caring and respect for others, and teaching inclusiveness. It includes play-based indoor and outdoor learning. The ongoing development of early learning development standards will be an important measure of how children are learning and progressing. The involvement of other ministries, including those responsible for health, social welfare and communities, offers an opportunity to improve the overall welfare of children.

21. The current policies provide that primary and secondary education is compulsory. The first eight years of formal education is within a primary school model, covering years 1 to 8. The following four years (years 9-12) are within secondary school and, in principle, compulsory. At year 10, students are given the option to continue their formal education or join a technical college for specific skills training for certificate II qualification.

22. In 2014, there were 138,672 primary school students and 68,063 secondary school students.[4] The student-teacher ratio for primary schools was 24:1, while for secondary schools it was 14:1.[5] Net enrolment in primary school was 99.43 per cent in 2014, though it declined to 81.7 per cent for secondary school.[6] This may be in part due to some students attending vocational secondary programmes, along with some having dropped out or sought employment directly. In 2015, there were 731 primary schools and 176 secondary schools in Fiji. This includes 75 secondary schools with vocational programmes, 17 schools for children with special needs and 3 technical college campuses.

23. A special feature of the educational system in Fiji is the predominance of community schools over government schools. Out of all the schools in Fiji, including early childhood education centres, only 14 are run by the Government; the rest are managed by the community in which the school is located.

24. Community schools in Fiji often display a connection between the wealth of the community and the resources of the school.[7] Disparities in wealth among communities perpetuate differences in the quality of education, although government programmes aimed at poor children are improving the situation. A zoning policy has also been applied to ensure that students are selected geographically and enrolled in schools close to their homes.

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[4] www.education.gov.fj/index.php/g/moe-statistics/student-enrolment.

[5] www.education.gov.fj/index.php/g/moe-statistics/student-teacher-ratio.

[6] Ministry of Education, Heritage and Arts, 2015-2018 Education Sector Strategic Development Plan, p. 17. Available from http://planipolis.iiep.unesco.org/upload/Fiji/Fiji-2015-2018_ESSDP_Education_Sector_Strategic_Devt-Plan.pdf.

[7] *Education in Australia, New Zealand and the Pacific*, Michael Crossley and others, eds. (Bloomsbury Academic, 2015), p. 250.

25. The Special Rapporteur notes that the nature of the partnership between the Government of Fiji and the school management committees (private or religious organizations) has changed over the past decade. He acknowledges that the Ministry of Education, Heritage and Arts has standardized school management procedures, and has control over curriculum development and the appointment of staff, including school heads and principals. Further, the majority of funds for teachers' salaries, student school fees and capital development are provided by the Ministry.

26. Some 98 per cent of schools are owned by the communities in which they are located, or by faith-based organizations. While private schools are not under government control and follow international curricula, community schools follow the same curricula as government schools and receive the same level of government funding.

27. It may be noted that, with regard to religion, conscience and belief, article 22 (4) of the Constitution of Fiji of 2013 provides that "every religious community or denomination, and every cultural or social community, has the right to establish, maintain and manage places of education … provided that the educational institutions maintain any standard prescribed by law". In addition, in exercising its rights under article 22 (4), "a religious community or denomination has the right to provide religious instruction as part of any education that it provides".

B. Technical and vocational education

28. The national technical and vocational education and training system is undergoing transformation. From 2012 to 2014, pursuant to an important policy measure, vocational courses were being mainstreamed into secondary schools in an effort to promote vocational training to meet skills requirements. As a government initiative, a memorandum of understanding established technical colleges in various education districts, beginning in 2015, to provide an alternate pathway to formal education and skills training for young people and school leavers.

29. There are 72 secondary schools that offer two-year vocational programmes that prepare students for the employment market. Courses cover such topics as automotive engineering, carpentry, catering, tailoring, welding, fabrication, office technology, computer studies, marine studies, woodcraft, sports and vocational agriculture. In 2014, there were approximately 3,459 students taking part, one third of whom were female. Most male students were studying automotive engineering, welding or carpentry, while the majority of female students were in catering and tailoring.

C. Tertiary education

30. The Government recognizes the critical importance of tertiary institutions for developing high-quality human resources, especially in an increasingly technology-driven world economy. It is grappling with the challenges facing tertiary-level institutions, including those relating to the strengthening of curricula, the improvement of funding and facilities, and staffing (especially among lecturers).

31. At the institutes of higher education, students can obtain degrees in the sciences, arts and humanities and social sciences. The Fiji National University is the largest university in Fiji, with the highest enrolment in tertiary-level education. In January 2010, six separate institutions were merged into the Fiji National University.

32. The University of the South Pacific, with its main campus in Suva, is a premier university in the Pacific region. It is an example of intergovernmental partnerships in education, with collaboration among 12 Pacific island States. Approximately 2,500 full-time students are enrolled in on-campus study, and an additional 5,000 study in off-campus/extension modules, based in various centres in neighbouring countries. The university conducts collaborative research through a research network. Such work includes research aimed at gaining a better understanding of human rights, as well as common ethics.

33. Fiji benefits from regional collaboration in the field of tertiary education. Australia makes a substantial contribution to tertiary and further technical education in Fiji. The University of Southern Queensland also operates two campuses in Fiji. In addition, Fiji benefits from cooperation with France and New Zealand in the field of education.

34. Fiji has strengthened its oversight of tertiary education through the establishment of the Fiji Higher Education Commission and a qualifications framework for technical education,[8] and is in the process of establishing a national research council.

V. Education reforms

35. Fiji has undertaken comprehensive reform of its education system. Reform-driven strategies address a number of areas. These include: (a) implementation of a curriculum framework to enhance spiritual, intellectual, social and physical development and strengthen instruction in *Vosa Vaka-Viti* and Hindi, as well as English; (b) improvement in the number and abilities of competent and motivated teachers, reduction of pupil-teacher ratios and increased use of standard improvement measurement in schools; (c) enhancement of the rural education programme by establishing appropriate infrastructure, improving standards, reviewing school performance and piloting a distance education programme; (d) strengthened partnership between government, communities, development partners, municipal councils, school management committees, developers and parents; (e) expanded technical and vocational educational and training for skills development; and (f) effective and efficient allocation of subsidies to tertiary institutions.

A. Key pillars of reform

36. The Special Rapporteur was informed about the three key pillars underpinning education reform: (a) strengthening staffing and the quality of delivery, with a focus on professional development, improvement of the methodology of teaching and learning, and recruitment of a large number of teachers to reduce the student-teacher ratio; (b) reviewing the curriculum, enhancing quality, developing specific methodologies for science and mathematics and reintroducing an examination system to evaluate the performance of students; and (c) improving the quality of infrastructure, especially in remote areas, and the quality of classroom delivery, including through rural service allowance schemes for teachers as an incentive to serve in remote and maritime areas.[9]

[8] For more details, see www.fhec.org.fj.

[9] Presentation to the Special Rapporteur by the Minister of Education, Heritage and Arts on 14 December 2015.

B. Policy texts underlying the reform process

37. As part of the reform process, Fiji has developed a range of policy texts, including on the following topics: early childhood education (2013); enterprise education; examinations and assessments (2012); grants distribution; effective implementation of inclusive education; establishment, recognition and registration of schools; national curriculum assessment and reporting; school zoning (reviewed in 2014); rural allowances; monitoring of school standards and inspection (reviewed in 2014); and special education (2013). In order to enhance their effectiveness, many of these policy texts could be converted into rules and regulations, with a coherent and holistic approach. This would also strengthen the national framework on the right to education. In the national curriculum assessment and reporting policy, which provides general guidance to schools regarding the assessment of students, general prescriptions such as the requirement for "equitable and relevant assessments" for student progress reports require further refining.

VI. Entitlement to education and universalized access

38. The right to education as an entitlement to access to education is inextricably linked with the right to education as empowerment in terms of knowledge, values, skills and competencies.

A. Accessibility: provision of education free of cost

39. Primary and secondary education in Fiji is tuition-free, and students are now given free textbooks. School-based vocational centres are also tuition-free. The "Topper's Scheme" scholarship programme provides free tuition for the top 600 secondary school graduates. The Tertiary Education Loans Scheme provides loans to all students who are accepted into a university or technical college, though these remain repayable in full at the rate of 20 per cent of the student's gross salary upon employment.[10]

40. The Special Rapporteur would like to recall that Committee on the Rights of the Child welcomed the Government's fee-free programme, which was designed to eliminate the cost of primary and secondary education, though it remained concerned that indirect costs, including uniforms, exercise books and transport costs, were causing children to drop out of schools, as their families could not afford those costs.

41. Nearly all students in their final year of primary education move on to the first year of secondary education, a commendable transition rate. However, the percentage of students completing primary education is diminishing due to the cost of fees and transport.[11] It may be recalled that Fiji accepted the recommendations made by the Working Group on the Universal Periodic Review in its 2010 review of Fiji (A/HRC/14/8) to ensure the full enjoyment by all children of the rights recognized in the Convention on the Rights of the Child, particularly with regard to access to education and health services.

42. The dropout rate, which is very low in primary school, is much higher in secondary school. The dropout rate for girls in secondary school is lower than that for boys.

43. In this respect, the Special Rapporteur would like to underline the importance of the "Matua" programme, which is aimed at providing continuing education for those who drop

[10] http://home.tslb.com.fj.

[11] International Council for Open and Distance Education. For more information, see www.icde.org.

out of school to address the issue of unemployment. The Special Rapporteur considers it important to relate literacy to skills development.

44. The Government is making an effort to provide one laptop or tablet per child as part of its commitment to digital literacy. It recognizes the importance of distant teaching for small islands, through a policy of providing one learning device for use by primary school students, especially in rural and remote areas. The Government has established information and communications technology telecentres and launched digital literacy programmes in schools in order to bridge the digital divide in rural and remote areas.[12]

45. In order to strengthen digital literacy in schools, the Government partnered in 2014 with the Reach 4 Your Future Foundation, an Australian non-profit organization, to implement a Microsoft-based digital literacy programme for primary students. In 2016, the programme is being expanded to include secondary students. While the Special Rapporteur supports such programmes, he urges the Government to be careful to ensure that such efforts are not captured by commercial or for-profit enterprises, as is the case in many other countries. The repercussions of such programmes on access to education free of cost also require careful consideration.

B. Infrastructure limitations

46. Infrastructure limitations constitute an important factor in regard to access to education. Accessibility is undermined by the geographical isolation of some schools in Fiji. Many primary schools are located on small outlying islands and in remote areas. Students in those places face difficulties in traveling to school daily. Teachers are reluctant to be posted to these schools because of poor living conditions and lack of proper infrastructure and utilities.

47. School infrastructure is a significant challenge for rural and maritime schools in Fiji. Schools on small, remote islands often lack a reliable supply of water or electricity. At the same time, schools in wealthier areas have more resources than those in poorer ones.

48. The location of schools in maritime areas and in the remote areas of the large islands gives rise to accessibility issues. Telecommunications are available in most parts of Fiji, but actual travel is still a challenge for some of the remote rural and maritime schools. This often contributes to a lower quality of education delivery in those areas. The geography of the country and the distribution of schools have resulted in some constraints on access to education. The wide distribution of the population also contributes to this problem.

C. Disparities in access

49. Disparities in access to education between rural/remote and urban areas continue to be a major challenge, as there is still a marked variation in the standard of basic school resources. Rural schools are less economically viable and cannot supplement government grants in order to maintain an acceptable standard of school environment that supports a quality teaching-learning process. Preschool is not yet covered as part of the "fee-free" education plan; however, the Ministry of Education, Heritage and Arts is subsidizing tuition for children in early childhood education. Addressing access limitations for children living in poverty should continue to be a priority for the Government.

[12] Statement by the Minister of Education, Heritage and Arts to the thirty-eighth session of the UNESCO General Conference, held in Paris in November 2015.

50. Schools for persons with disabilities deserve special consideration with regard to disparities in education. Fiji currently has 17 "special education" schools, which cater exclusively to students with disabilities. These schools, which had 120 teachers and 882 students in 2014, provide specialized education programmes for students with physical and mental learning difficulties. As recognized in article 24 of the Convention on the Rights of Persons with Disabilities, such students are receiving an inclusive education within the mainstream education system.

51. The Special Rapporteur visited the Hilton Special School, which is a school for students with disabilities. The capacity to address the needs of all students with disabilities should be strengthened. Greater support for students with disabilities in the 2016 budget should be targeted towards the creation of an inclusive education programme for all regular schools.

52. There remain a significant gender disparity among education professionals. There are more female teachers than male ones in primary and secondary schools. Among professionals in the administrative/managerial category, however, the opposite is true. Around 10 per cent of leadership positions (principals or managers) in primary and secondary schools are held by women.

53. Concerns were also raised by the Committee on the Rights of the Child regarding adolescent pregnancy and subsequent school dropout, and the fact that rural schools frequently face with a lack of access to water, electricity or means of communication. In its 2014 concluding observations to Fiji (CRC/C/FJI/CO/2-4), the Committee asked Fiji to elaborate on the progress achieved in implementing the inclusive education policy. The Committee recommended that Fiji allocate sufficient financial support to ensure that all schools were provided with the infrastructure necessary to provide for an effective learning environment.

54. The Special Rapporteur would like to commend the policy measure taken by the Government to rename schools that previously had names with an ethnic connotation. This is an important reform measure to eliminate schools based on ethnicity, and was recognized by the Committee on the Elimination of Racial Discrimination in its 2012 concluding observations to Fiji (see CERD/C/FJI/CO/18-20, para. 16).

55. The Special Rapporteur would like to mention educational deprivation on account of poverty, which is the greatest obstacle to realizing the right to education. In accordance with the article 13 of the International Covenant on Economic, Social and Cultural Rights, as well as the Convention against Discrimination in Education, public policies need to be devised to provide financial and pedagogic support, along with positive measures, for all those who remain deprived of their right to education in order to mitigate inequities based, inter alia, on social origin and wealth.

56. There seems to be lack of consistency as regards the implementation of *Vosa Vaka-Viti* language instruction. The iTaukei traditions are fading out in schools, and there is fear that the language might be waning. However, concern has been expressed that compulsory *Vosa Vaka-Viti* language instruction is affecting indigenous students' knowledge of English, which is later affecting their attainment levels in tertiary education and future employment opportunities. Disparities between rural and urban students, and between iTaukei and other students, should be addressed with targeted interventions.

VII. Empowerment and quality of education

57. There is a reported disparity in the quality of education in different schools. The gap appears to be related to the economic wealth of communities.

A. Quality concerns in the Education Sector Strategic Development Plan

58. The first Education Sector Strategic Development Plan, developed in 2008 for the period 2009-2011, shows the commitment of Fiji to addressing the quality of education. It affirms the principle of universal access to an expanding, improving and inclusive education, with an innovative curriculum that promotes the development of lifelong skills and good citizenship. It stipulates that all schools should be well resourced, with increased prominence given to technical and vocational education, along with training in education, in order to develop a competent, appropriately qualified, skilled and productive workforce for sustainable development in Fiji.[13]

59. In order to improve the quality of education in Fiji, the Ministry of Education, Heritage and Arts developed a strategic development plan for the period 2015-2018 to address nine priorities in the education sector: (a) improving equitable access to education for all children; (b) strengthening the national curriculum framework to ensure that knowledge, wisdom, skills and cultural, moral and religious values are taught; (c) ensuring that school environments enhance student character, physical development and personal and national identity, and promote social cohesion; (d) ensuring that education professionals are qualified and reflect gender parity; (e) promoting technical education; (f) strengthening partnerships between schools and their communities to improve school management; (g) improving information management; (h) safeguarding the cultural heritage of Fiji; and (i) maintaining a qualifications framework to create skilled workers.

60. The Special Rapporteur noted with great interest that Fiji had developed a national qualifications framework to establish uniform national norms for quality, infrastructure, curriculum content and teacher qualifications. This framework must be refined to further promote civic education, as well as the moral values necessary for making children responsible citizens.

B. A holistic approach to quality

61. The Peoples' Charter for Change, Peace and Progress, adopted on 15 December 2008, recognized the need to promote shared national values through a national education curriculum for multicultural education and to implement a progressive and responsive curriculum. It embodies both moral vision, inspired by the concept of social justice and common good, and the concept of human dignity and equal opportunity. It also recognizes the importance of sharing spiritual and interfaith dialogue, and is aimed at setting morals and standards.

62. The compulsory teaching of conversational and contemporary *Vosa Vaka-Viti* and Fiji Hindi languages in schools is a welcome change, as it promotes respect for cultural diversity and mutual respect for each other. Cultural diversity is inseparable from linguistic diversity, and the teaching of these languages responds to the needs of a multicultural society.

[13] www.unesco.org/education/edurights/media/docs/7e20f9ccaca3b6382563658a4ca2773b7a61c48f.pdf.

C. Assessment of student educational attainment

63. The Special Rapporteur would like to underline the importance of the assessment of student educational attainment through a uniform national system, which ensures that minimum standards of educational achievement are respected as students progress through the education system.

64. Ethnic differences are still a concern in terms of performance on examinations. Indigenous Fiji islander students lag behind other ethnic groups on major external examinations. Similar gaps are also evident between students in rural and urban schools. Priority spending in education is a major factor that could contribute to the difference in performance.

65. The Special Rapporteur welcomes the fact that annual testing and monitoring of results has been reinstated. It can be hoped that this will raise the learning achievements of all students and lead to further reforms.

66. In this respect, he commends the concept of education as a common good, which has been embraced by the Government of Fiji. Education should enable the full realization of human rights, as well as human development. It is also a noble cause, and must be safeguarded as a public good. Care must be taken not to envision education as a factory, with inputs and outputs; education is a lifelong learning process. Instead, the policy focus should be on students' educational attainment in whatever setting and at whatever level of education as a lifelong pursuit.

D. Fostering human values as essential objectives of education

67. It is commendable that the Education Sector Strategic Development Plan for the period 2015-2018 underlines the importance of strengthening the Fiji National Curriculum Framework to ensure that knowledge, wisdom, skills and cultural, moral and religious values are taught in order to improve the quality of education in Fiji. The strategy also expresses the need for ensuring that school environments enhance student character, physical development, and personal and national identity, and promote social cohesion.

68. It is important to consider that the Constitution of Fiji allows the State to direct any educational institution to teach subjects pertaining to health, civic education and issues of national interest, and that educational institutions must comply with any such directions made by the State.

69. It may also be noted that Fiji accepted the recommendation of the Working Group on the Universal Periodic Review in its 2010 review that Fiji to integrate a component on human rights education and training into its education system.

70. Full development of the human personality is an essential objective of education, laid down in international human rights conventions. Education can create a better world by enabling children and adults to develop attitudes and behaviour patterns that fill them with a spirit of mutual respect and solidarity and make them respectful of one another's ways and culture. The four pillars of education, propounded by the International Commission on Education for the Twenty-First Century in 1996 in its report "Learning: the treasure within", are of perennial importance: learning to know, learning to do, learning to live together and learning to be. The Fiji National Curriculum Framework is grounded on these four pillars in its development and implementation.

71. The Special Rapporteur hopes that, in the course of expanding educational opportunities, the empowering role of education of high quality is not neglected and that the provision of quality education receives constant attention, with a focus on the humanistic mission of education.

E. Challenges facing the teaching profession

72. A number of concerns were brought to the attention of the Special Rapporteur during his visit. There has been an acute shortage of qualified teachers at the secondary level. The Special Rapporteur is concerned about the state of the teaching profession in Fiji.

73. The personal hardships of living and teaching in remote and maritime schools is a serious obstacle to finding qualified teachers to teach in such schools. Although a rotation system exists to ensure that teachers do not remain in one place, additional consideration needs to be given to incentives and transparency in the operation of this system to ensure that teachers have incentives to serve in rural and remote schools.

74. Teacher remuneration remains a contentious issue in Fiji. Teacher pay was recently reduced for newly recruited teachers during their probationary period. This makes it particularly difficult to attract and retain well-educated teachers, who often seek other government positions when possible. The recent move towards placing all teachers on temporary contracts undermines professionalism, and will deter qualified candidates from pursuing a career in teaching. In order to attract and retain better candidates, teacher working conditions and salaries should be an incentive, not a disincentive. Increases for teachers in rural and maritime areas, however, are welcomed.

75. Teacher qualifications remain an area of concern. Recognizing the lack of educational qualifications among teachers, the Government is promoting professional development incentives. Teacher pay is increased based on educational qualifications, and teachers are provided time off to upgrade their qualifications. Despite this, very few teachers have pursued this option.

VIII. Financing of education

76. Investment in education is an obligation of States under human rights law, and the resources allocated to the education sector on a constant basis evidence the commitment of the Government to the development of education in Fiji.

77. Civil society continues to praise the Government for the sizeable proportion of the budget that is dedicated to education. The contributions have remained steady over the years and have been an integral aspect of Prime Minister Bainimarama's campaign. In 2014, the Government announced a F$ 541.5 million budget for the education sector, almost double what was spent in 2000 and approximately F$ 100 million more than what was spent 2013. Education-related spending was about 4.1 per cent of GDP in 2015.[14] This was projected to rise to 7.5 per cent, consistent with a similar rise since 2014. In 2015, the Government allocated the highest percentage of its budget to education: 16.7 per cent of the total.[15] The budget in 2015 also provided for the introduction of subsidized tuition for 5-year olds at accredited preschools, free tuition at vocational schools, the introduction of a

[14] www.fiji.gov.fj/getattachment/944500a8-490a-41b3-802c-372783f0fdc1/2016-NATIONAL BUDGET---ESTIMATES.aspx.

[15] Statement by the Minister of Education, Heritage and Arts to the thirty-eighth session of the UNESCO General Conference.

scholarship scheme for the top 600 secondary school graduates, a student loan programme for all other graduates seeking post-secondary education and a free milk programme for year 1 students.

78. A 7.6 per cent increase in the education budget for 2016 is intended to provide for the recruitment of 350 new teachers, to increase teacher salaries in both primary and secondary schools, to increase the remote location allowance for teachers and to allow for the establishment of eight more technical colleges. Education and training continue to be the Government's top priority. Investment in the education sector has been unwavering, with the largest share of the annual budget of Fiji devoted to this area.

79. The unprecedented increase in financial resources devoted by the Government to education must be commended, as it demonstrates a deep commitment to the future of this country. The Special Rapporteur was informed that 80 per cent of grants in the Prime Minister's office are used for education.

80. Domestic resources can also be mobilized from local communities that own community schools that supplement funding through fundraising activities. Such funding sources are organized by school management and target specific projects within the school or contribute towards recurrent costs. However, wealthier communities are more adept at supplementing government funds for education.

81. Development partners also contribute to the education budget, and the education system relies on this to fill in gaps. Without these donations, the system stands to fall short and the progress of certain activities to be derailed, especially new initiatives identified for holistically uplifting learning and teaching.

82. Despite an enhanced budget for domestic resource mobilization, education continues to require further investment. Many schools seeking to raise their standards and improve the quality of education offered are constrained by their Government-provided budget.

83. The Special Rapporteur would like to suggest a model whereby all education-related fundraising, for example through philanthropy, is placed in a national trust fund. This fund would enhance the national investment in education through domestic resource mobilization. With an equity-based approach, financial resources for education should be judiciously utilized.

84. Primary and secondary education is designed to be compulsory and free. In the past three years, the Government has allocated approximately F$ 500 million each year to education.[16] This results in schools receiving between F$ 425 and F$ 710 per child for primary and for secondary schools, depending on enrolment and student year.

85. In order to address geographic differences, the Ministry of Education, Heritage and Arts is experimenting with awarding grants based not just on student enrolment, which favours larger, urban schools, but also on all operating costs. The new formula takes into account a number of indices: the distance of the school from main towns or cities; accessibility by boat or road; the mark-up of the prices of materials and transportation costs because of distance and difficulty of access; the availability and frequency of public transport and telecommunications; the amount of economic support for small-island schools; and the availability of amenities such as water, electricity and medical facilities.

86. The Special Rapporteur understands that the present funding formula, which provides money on a per-student basis, disproportionately benefiting large urban schools at

[16] www.fiji.gov.fj/Media-Center/Speeches/2014-national-budget-announcement.aspx; see also www.radionz.co.nz/international/pacific-news/227158/free-education-for-primary-and-secondary-school-students-in-fiji.

the expense of the small rural ones, is being reviewed in order to provide more financial support in marginalized and rural areas.

87. In addition to ensuring academic merit, a scholarship system should also ensure that students from rural or economically disadvantaged environments are given better educational opportunities.

IX. Skills development: valorizing technical and vocational education and training

88. Fiji, like almost all developing countries, needs to address skills development through technical and vocational education and training.

89. In response to youth unemployment and a high demand for skilled labour, the Government of Fiji has embarked on an ambitious programme to strengthen this sector. The Government recognizes the key importance of technical and vocational education and training. From high school, students can opt for technical colleges. A range of technical courses and programmes are offered in these colleges, which provide free skills development programmes. The Government should provide the impetus for the creation of a viable, attractive technical and vocational education and training programme with competency-based incentives for students.

90. It may be recalled that, in its 2014 concluding observations to Fiji, the Committee on the Rights of the Child recommended that Fiji undertake impact assessments of educational strategies and take corrective measures to ensure that school leavers were prepared for the demands of the national job market.

91. The Qualifications Framework, established by the Fiji Higher Education Commission, sets down the qualifications for a national certificate in 25 trades and vocations,[17] along with a system whereby students can learn trades which they can practise throughout Fiji, as well as the Pacific region. Further, through close collaboration with industry, students, schools and the Government can provide targeted training to ensure that graduates are able to find employment.

92. In his visit to technical colleges, the Special Rapporteur found they were of reasonable quality, but that they needed to expand their coverage and student intake. Moreover, collaboration with industry was weak, and it was reported that companies preferred to hire employees from abroad, justifying their choice by pointing to a lack of skilled local workers.

93. Increasing the attractiveness of technical and vocational training and education within Fiji must begin in the school system. Recent reforms to introduce access to technical and vocational education and training programmes in secondary schools, and to develop skills-specific programmes in conjunction with industry, are promising. However, implementation will determine whether the youth of Fiji will be able to find employment.

[17] Agriculture; aircraft maintenance; automotive (electrical and electronics); automotive (mechanic); baking and patisserie; basic security operations; beauty therapy; body works and spray painting; cabinet making and joinery; carpentry; cookery; electronics and engineering; electrical fitter mechanic; fabrication and welding in fitting and machining; heavy commercial vehicle mechanic; heavy mobile plant mechanic; marine engineering in printing; navigation and seamanship; printing; plumbing; sheet metal; public transportation (bus driving), refrigeration; heating, ventilation and air conditioning; saw doctoring; and tourism (tour guiding).

94. The Special Rapporteur observed with concern that professional post-secondary institutions reportedly received inadequate funding to maintain their buildings and operate their classes. In the Revised Recommendation concerning Technical and Vocational Education, adopted in 2001, the General Conference of UNESCO noted that "Government and the private sector should recognize that technical and vocational education is an investment, not a cost, with significant returns" (see para. 9 of the Recommendation). It should be ensured that the quality of technical education is sufficiently high and respectable to allow graduates to be attractive to potential employers, without excessive additional training requirements.

95. The national shortage of skilled tradespersons leaves serious gaps, particularly in the construction and tourism industries. The Government must develop innovative approaches to ensure that national human resource policies and the education system lead to a reduction of this dependence on non-Fijians by developing a competent and skilled national workforce. The human resources development strategy needs to be harmonized with an immigration policy geared towards increasing the size of the trained workforce.

96. Care should be taken to ensure that technical and vocational education and training programmes are not constrained on account of meagre resources. These programmes deserve greater financial investment. Institutional collaboration with industry and sustained public-private partnerships are possible avenues for mobilizing more resources. Raising the esteem in which technical education is held, and making it professionally rewarding, is essential, as is developing critical thinking skills in students. This can be done by awarding national prizes to technical and vocational education and training students to raise the profile of technical education in society.

X. Reforming the legislative framework on the right to education

97. Education reform has been advancing rapidly in Fiji; however, the underlying legal framework has not kept pace. The Education Act of 1978 needs to be updated. The Act contains provisions on school fees which are not in consonance with the 2013 Constitution or the Education Sector Strategic Development Plan for the period 2015-2018 with respect to providing education free of cost.

98. It must be noted that the Education Act of 1978 has certain commendable elements, such as the concept of the "best interests" of education in relation to regulating private providers of education, and the existence of certain minimum facilities as an important condition for recognition of private schools (arts. 15, 16, 19 and 30). In revising the Act, the concepts of management of schools and liability of management, along with the regulations concerning financial accountability and the keeping of proper accounts of school income and expenditure, and the maintenance of controlling authorities (parts IV and part XII of the Act) are elements of great interest. These are very pertinent today in the context of privatization in education, so that education is preserved as a public good, safeguarded against forces of privatization and not allowed to be reduced to a business.

XI. Enforcement of the right to education

99. In order for the right to education to be safeguarded in the event of any breach or violation, the national legal system should provide mechanisms—judicial as well quasi-judicial—for its justiciability and enforcement.

A. National human rights institution

100. The Fiji Human Rights and Anti-Discrimination Commission was established according to article 45 of the Constitution. It consists of five members who are appointed by the President on the advice of the Constitutional Offices Commission. The Fiji Human Rights and Anti-Discrimination Commission can receive and investigate complaints, which it seeks to resolve through conciliation. Unresolved complaints can be referred by the Commission to a legal process. As of the date of the visit of the Rapporteur, a chair to head the Commission had not been appointed.

101. Concerns were brought to the attention of the Special Rapporteur that the selection of commissioners was not fully respectful of the principle of independence of the Commission, established in the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles). Moreover, as of 2014, the new Commission had not been accredited by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights.[18] The Special Rapporteur urges the Government to ensure the Commission full independence in its work, to comply with the Paris Principles and to take steps towards accrediting it. It is also important that teachers, students, parents and other stakeholders have recourse to an independent body outside of the court system to resolve disputes relating to a breach or violation, as the court system is unduly expensive in many such situations.

B. Adjudicating the right to education

102. It is well acknowledged that the right to education is a justiciable right. In his 2012 report to the Human Rights Council,[19] the Special Rapporteur reported on the several ways and the many jurisdictions in which violations of the right to education had been brought before courts, both civil and common-law. New education legislation in Fiji should specifically identify the rights of students, as well as the responsibility of teachers to ensure that equitable, high quality education is available for all. Knowledge on how the right to education has been adjudicated, particularly in other common-law jurisdictions, would be useful to courts, the Fiji Human Rights and Anti-Discrimination Commission, the Government and lawyers to ensure that this right is protected in the event of its violation.

XII. Conclusions

103. **Fiji is going through a historic period of transition in the education system. As a result of important reforms ushered in by the Government, along with a national initiative to overcome the "ethnic divide" and build a better Fiji for all, the education system is undergoing transformation. Despite political instability, Fiji celebrated a democratic election in 2014, which sought to develop a common national identity and promised to usher in an era of stability and progress. The right to education has been established by the new Constitution, adopted in September 2013, and important reforms have been undertaken by the Government. The Special Rapporteur is encouraged by the commitment the Government of Fiji has shown towards implementing this right. The unprecedented increase in financial resources devoted by the Government to education must be commended, as it demonstrates a deep commitment to the future of this country.**

[18] www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf.

[19] A/HRC/23/35.

104. Fiji has achieved universal access to basic education, and the Special Rapporteur was impressed by the progress he observed in implementing the right to education throughout the country. However, disparities between rural and urban students and between iTaukei and other students remain and should be addressed with targeted interventions.

105. Despite the reforms and national efforts, student educational attainment remains below expectations, and more needs to be done. Fiji must now continue to take measures to improve the quality of the education system, in keeping with the Education Sector Strategic Development Plan for the period 2015-2018. The Special Rapporteur notes with great interest that Fiji has developed a national qualifications framework to establish uniform national norms for the quality of teaching, curriculum content and pedagogy, as well as school infrastructure. These are the basic tenets, and must be constantly improved.

106. In response to youth unemployment and a high demand for skilled labour, the Government of Fiji has embarked on an ambitious programme to strengthen the technical and vocational education and training sector, with innovative institutional structures in the form of technical colleges. However, raising the esteem in which technical and vocational education and training are held, and making them professionally rewarding, are essential. At the same time, funding for this sector of strategic importance must be enhanced.

107. It is incumbent upon the Government of Fiji to raise the profile of the right to education on account of its political commitments to the 2030 Agenda for Sustainable Development, the Incheon Declaration of May 2015 and the Education 2030 Framework for Action (see para. 12 above).

XIII. Recommendations

108. Taking into consideration the above and his findings during the mission, the Special Rapporteur wishes to make the following recommendations with a view towards contributing to the improvement of the education system in Fiji.

Ratifying international instruments

109. The Government of Fiji should promptly sign and ratify the key international instruments, including the International Covenant on Economic, Social and Cultural Rights and the Convention against Discrimination in Education. The Government should also ratify the Convention on the Rights of Persons with Disabilities, signed in 2010.

Overcoming disparities in education

110. Fiji must overcome disparities in education, such as disparities between rural and urban areas, promote a system of equitable access to education in favour of all those who remain marginalized, and take affirmative measures, with special consideration for the poor. More needs to be done to address public perceptions of persons with disabilities. There is an urgent need for a public information campaign to deal with social stigma and to educate teachers, parents and children to promote the right to education for children with disabilities.

111. Education policies should seek to bring about equality of opportunity, both in law and in fact. The fundamental principle of equality of opportunity provides the essential basis for the establishment of an entire range of programmes and policies,

guided by equitable approaches in favour of the marginalized, in particular children from poor families.

Modernizing education law

112. Recent reforms in education in Fiji are underpinned by a transformative policy framework and programmatic approaches, which are commendable measures. However, national legislation has not kept pace with these reforms and practices. The current Education Act dates from 1978, and its provisions no longer reflect current educational policies and practices.

113. Fiji therefore needs to modernize its education law and to create an enforceable legal framework. The new act should integrate the large number of policy texts that have come into existence.

114. A modernized education law should be comprehensive so as to strengthen the foundations of the right to education in the national legal system. It should ensure that all aspects of the right to education are clearly defined, along with the role and responsibility of parents, students, teachers and the community. It should also lay down the objectives and content of education, with a focus on its humanistic mission. The new law should cover all key dimensions of the right to education, including providing universal education without discrimination or exclusion; upholding norms and standards related to the quality of education; revamping technical and vocational education and training for skills development; fostering lifelong learning; enhancing national investment in education; regulating and controlling private providers of education; and safeguarding education as a public good. Whether there is one comprehensive education law or a set of laws addressing various key areas, this should be accompanied by the rules and regulations necessary for effective implementation.

115. While elaborating the new education act, it is important to retain the provisions of the Education Act of 1978 that are most pertinent today, notably the concept of the "best interests" of education as a guiding principle for regulating private providers of education, their recognition being contingent upon meeting certain conditions (arts. 15, 16 and 30 of the Act). In particular, in the light of the importance accorded to responsibility and accountability in the provision of education today, it is important to retain the concepts underlying the management of schools, along with those concerning the liability of management and their financial accountability, all of which are mentioned in part IV of the Act.

116. The laws and policies should put premium on ensuring that education is not reduced to a business and is safeguarded against the forces of privatization.

Human Rights and Anti-Discrimination Commission

117. The Fiji Human Rights and Anti-Discrimination Commission should be strengthened to meet the requirements of the Paris Principles and should be duly accredited as soon as possible to provide an independent mechanism for Fiji islanders to enforce their human rights.

118. In particular, guidance should be given to the Commission, as well as the national courts, on how the right to education should be adjudicated.

Upgrading standards and the quality of education

119. As a follow-up to the Education Sector Strategic Development Plan for the period 2015-2018, the Government should develop and implement necessary norms and standards related to quality. In keeping with the National Assessment

Framework, Fiji should embrace a "comprehensive system of quality education and learning" based on a holistic concept which goes beyond the instrumental role of education in mathematical literacy and numeracy, and places a premium on the humanistic mission of education. Further consideration should be given to strengthening the Fiji National Curriculum Framework to ensure the teaching of knowledge, wisdom, skills and cultural, moral and religious values.

120. **Quality imperatives should be a determining factor in investing in education as against recurring expenditures so as to provide a necessary financial resource base for giving effect to high quality standards and curriculum development. Enhancing national investment to foster public policy concern about the quality of education deserves much more consideration.**

121. **Quality education also necessitates that teachers should be capable of developing critical thinking in children and adults, and nurturing moral values.**

122. **In order to meet quality imperatives, Fiji needs to set common standards and norms that are conducive to building professional excellence, accompanied by instruments for monitoring and assessing the quality of education.**

Fostering respect for cultural and linguistic diversity

123. **Following the elimination of single-ethnicity schools and the mandating of compulsory teaching of *Vosa Vaka-Viti* and Fiji Hindi at a conversational level in schools, measures aimed at promoting respect for cultural diversity and mutual respect for each other must be intensified, as cultural diversity is inseparable from linguistic diversity in a multicultural society.**

Strengthening the teaching profession

124. **Teachers in Fiji face many challenges. The professional standing of teachers and the esteem in which the teaching profession is held need to be improved.**

125. **Questions regarding the status of teachers must be addressed in an effort to make the teaching profession more attractive, and held in higher esteem from a career development perspective. Contractual teaching, which erodes teachers' morale, motivation and commitment, must not be embraced; rather, the education law should clearly define the roles and responsibilities of teachers, ensuring that the teaching profession becomes an attractive career. Transparency is vital to ensure that there is no perception of undue interference in the selection, placement or promotion of teachers.**

126. **Reviewing the accountability and oversight of teacher performance is a vital function of the Ministry of Education, Heritage and Arts, and greater resources should be allocated to ensure that teachers are meeting the standards set by the Ministry. The current system relies on head teachers adopting and disseminating new and revised curricula, and being responsible for overseeing local teacher performance. The Ministry should develop and implement mechanisms that identify teachers who require additional training and support, and ensure that they are able to improve their performance so that children in all schools benefit from high quality education.**

127. **A fair and effective teaching rotation policy should be strengthened to encourage teachers to teach in remote and maritime schools. In addition to financial incentives, a fair and transparent rotation policy should be included in promotion and placement considerations.**

Role of parents and community

128. **Education is the primary responsibility of the Government, but it is also a social responsibility. Parents, teachers and communities have important roles to play in school management and educational governance in local settings. The Government must make greater efforts to include parents as key stakeholders in improving education. Parents must be provided with channels to flag concerns to the Ministry of Education, Heritage and Arts.**

Strengthening technical and vocational education and training

129. **The Government should continue to strengthen the secondary school curriculum with a view towards creating a viable, attractive technical and vocational education and training programme which will provide qualified, capable graduates for professional post-secondary institutes. This programme should also seek to increase the number of women entering technical fields and the workforce.**

130. **Closer partnerships with industry are needed to ensure that graduates have the skills needed to find work after graduating. In-school vocational training fairs, on-site school visits and similar initiatives may help students better appreciate the career possibilities associated with non-academic career options.**

131. **The perception among teachers, students and parents that technical and vocational education and training is a career path of last resort must be transformed. Technical and vocational education and training should be made more attractive and professionally esteemed as a system that produces the skilled workers that the economy of the Fiji requires. Technical institutions should not be treated as a stream apart, but rather as an integral part of educating the youth of Fiji.**

132. **Technical and vocational education and training should be valorised as a professional career path, with a campaign for raising its social perception and the esteem in which it is held. Policymakers, educators and teachers must work with students, parents and industrial partners to help spread the message that the competencies and skills that respond to the rising aspirations of youth in today's globalized economy provide leverage in economic development and social progress. Teachers must also be trained so that they can better guide students towards non-academic career options in a positive way.**

133. **Recognizing the economic importance of strengthening the technical and vocational education and training sector, the Government should continue to strengthen funding for vocational post-secondary institutions. The Government should explore a diverse range of funding mechanisms and resources for this sector. For example, as part of the corporate social responsibility tax, enterprises can be encouraged to invest in this sector in recognition of its key importance for industrial development and economic growth. Even a special fund could be envisaged in order to leverage existing resources for national technical and vocational education and training programmes, in particular for technical equipment and facilities. The Government should consider sharing to the maximum extent possible funding for technical and vocational education and training with industry and the private sector, with appropriate incentives to that end.**

134. **While the proposal for a formal memorandum of agreement between the Ministry of Education, Heritage and Arts and the trustees or school board of the Technical College of Fiji pursuant to policies on development and management of the College is a welcome development, it is even more important to broaden this approach, providing a memorandum of cooperation with industry and enterprises as well, in order to develop an institutionalized collaboration with them.**

Funding of education

135. **The significant recent increases in financial resources devoted by the Government to education must be commended, as this demonstrates a deep commitment to the future of this country. However, the funding should be better distributed to address the specific requirements of each school to ensure that the quality of education is equitable and that quality standards are comparable throughout the country. The current disparities in quality and infrastructure between large, urban schools and rural and maritime schools must be urgently addressed.**

136. **The Government should consider enacting legislation that establishes a funding model for education that establishes minimum funding levels and provides equitable mechanisms to address inequalities. One example could be the establishment of a national education endowment fund into which all money that is raised privately is pooled and distributed according to need to ensure that schools in wealthier areas are not unduly advantaged.**

Key role of Fuji for promoting right to education in the Pacific region

137. **Fiji is an education hub in the Pacific region, and it would be opportune if Fiji were to organize regional-level events in order to exchange experiences in key areas such as skills development and education programmes for preserving cultural heritage and Pacific ethos. In a region where countries have committed themselves to regional cooperation, Fiji can play a pioneering role in giving visibility to such concerted action.**

Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

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I. Introduction

1. The private sector's role in the digital age appears pervasive and ever-growing, a driving force behind the greatest expansion of access to information in history. Vast social media forums for public expression are owned by private companies. Major platforms aggregating and indexing global knowledge, and designing the algorithms that influence what information is seen online, result from private endeavour. The infrastructure for mobile technology, by which billions communicate and reach the Internet, depends upon private investment, maintenance and ownership. The tools for law enforcement and intelligence are often drawn from products of the private surveillance and data-processing industries. Private companies design, manufacture and often maintain the devices or services on which the most important personal data are stored — from financial and health-care information to e-mails, text messages, search histories, photographs and videos.

2. The contemporary exercise of freedom of opinion and expression owes much of its strength to private industry, which wields enormous power over digital space, acting as a gateway for information and an intermediary for expression. In digital environments, important questions about applicable law and the scope of private authority and public regulation cannot be avoided. Should these private actors have the same responsibilities as public authorities? Should their responsibilities derive from human rights law, terms of service, contractual arrangements, or something else? How should relationships among corporate actors and States be structured? When faced with pressures to conduct their businesses in ways that interfere with freedom of expression, what steps should private actors take? Refuse to enter markets or withdraw from them? Advise their customers about such pressures? As the world moves ever more deeply into digital space, with the "Internet of things" on the near horizon, guidance is critical to ensure rights are promoted, protected and enjoyed.

3. The present report has several aims.[1] First, it seeks to identify the categories of private actors that deeply influence the freedom of expression in a digital age. Secondly, it identifies questions concerning both the private sector's protection of freedom of opinion and expression and public authorities' responsibility to ensure the protection of space for expression. Thirdly, it lays out several areas in which normative guidance appears to be most needed. These areas will be addressed and consolidated through thematic reporting, country and company visits, and communications and consultations with Governments, the business sector and civil society. In short, the present report is the first of several the Special Rapporteur will present in order to provide guidance on how private actors should protect and promote freedom of expression in a digital age.

4. Public process of input and consultation contributed to the development of the present report. On 3 December 2015, the Special Rapporteur issued a call for input to the report. As of the date of publication, the Special Rapporteur received 15 submissions from States[2] and 15 submissions from organizations[3], all of which are to be found on the Special

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[1] The Special Rapporteur would like to thank his legal adviser, Amos Toh, and his students at the University of California, Irvine School of Law, for their assistance with the preparation of this report.

[2] Armenia, El Salvador, Estonia, Greece, Jordan, Kuwait, Mauritius, Mexico, Netherlands, Peru, Republic of Moldova, Romania, Slovakia, Turkey and United States of America.

[3] Article 19; Association for Progressive Communications; Center for Democracy and Technology; Center for Technology and Society; Centre for Communication Governance at National Law University, New Delhi; Danish Institute for Human Rights; Derechos Digitales; European Digital Rights; Freedom Online Coalition Working Group on Privacy and Transparency Online; Global Network Initiative; Institute for Human Rights and Business; International Centre for Not-for-Profit

Rapporteur's website.[4] The Special Rapporteur also benefited greatly from consultations. He held a meeting on 25 and 26 January 2016 with 25 members of civil society at the University of California, Irvine School of Law, and a separate meeting with 20 individuals from the private sector and civil society on 29 February 2016 at the Office of the United Nations High Commissioner for Human Rights in Geneva. Meeting summaries are also be found on the Special Rapporteur's website.

II. Freedom of expression, States and the private sector in the digital age

5. This mapping report rests on a basic question: to what extent should the information and communications technology sector be responsible for the promotion and protection of freedom of opinion and expression? Addressing this question requires beginning with a summary of the international human rights law according to which States are obligated to promote and protect freedom of expression and principles addressing private-sector human rights responsibilities.

A. International legal framework

6. Article 19 of both the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights protects everyone's right to hold opinions without interference and to seek, receive and impart information and ideas of all kinds, regardless of frontiers and through any media. It has become customary to emphasize that individuals enjoy the same rights online as they do offline. The previous mandate holder highlighted the increasing number and forms of restrictions on the right to information online (see A/HRC/17/27) and demonstrated the impact on freedom of expression of expanded digital surveillance (see A/HRC/23/40). In 2015, the Special Rapporteur emphasized the important role played by encryption and anonymity in protecting and advancing the freedom of expression (see A/HRC/29/32). In joint declarations, the Special Rapporteur and regional counterparts have emphasized issues relating to intermediary liability, access, content restrictions and other key topics on freedom of expression online.

7. Article 19 (3) of the International Covenant on Civil and Political Rights allows for restrictions on the freedom of expression (but not on the freedom of opinion under article 19 (1)). According to article 19 (3), any restriction, to be legitimate, must be provided by law and necessary for the respect of the rights or reputations of others or the protection of national security or of public order, or of public health or morals. Any restriction must be precise enough and publicly accessible in order to limit the authorities' discretion and provide individuals with adequate guidance (see the Human Rights Committee's general comment No. 34 (2011) on article 19: freedoms of opinion and expression). To be necessary, a restriction must be more than merely useful, reasonable or desirable.[5] It is also well established that necessity requires an assessment of proportionality (see A/HRC/29/32). Proportionality requires demonstrating that restrictive measures are the least intrusive instrument among those which might achieve their protective function and proportionate to the interest to be protected (see general comment No. 34). When

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Law; Internet Society; Korean Progressive Network Jinbonet; Privacy International; Ranking Digital Rights; and New America.

[4] Available from www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Annual.aspx.

[5] European Court of Human Rights, Application No. 6538/74, *The Sunday Times v. The United Kingdom* (26 April 1979), para. 59.

restrictions fail to meet the standard of article 19 (3), individuals enjoy the right to an effective remedy under article 2 (3) of the Covenant.

8. Individuals enjoy the full range of other rights online as well, such as privacy, religious belief, association and peaceful assembly, education, culture and freedom from discrimination. States have both a negative obligation to refrain from violating rights and a positive obligation to ensure enjoyment of those rights. These positive obligations may require public authorities to take steps to protect individuals from the actions of private parties.[6]

B. A framework for private sector responsibilities

9. Human rights law does not as a general matter directly govern the activities or responsibilities of private business. A variety of initiatives provide guidance to enterprises to ensure compliance with fundamental rights. The Human Rights Council endorsed the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (see A/HRC/17/4 and A/HRC/17/31). Reflecting existing human rights law, the Guiding Principles reaffirm that States must ensure that not only State organs but also businesses under their jurisdiction respect human rights.[7]

10. The Guiding Principles provide a framework for the consideration of private business responsibilities in the information and communications technology sector worldwide, independent of State obligations or implementation of those obligations. For instance, the Guiding Principles assert a global responsibility for businesses to avoid causing or contributing to adverse human rights impacts through their own activities, and to address such impacts when they occur and seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.[8]

11. Due diligence, according to the Guiding Principles, enables businesses to identify, prevent, mitigate and account for how they address their adverse human rights impacts.[9] In the digital environment, human rights impacts may arise in internal decisions on how to respond to government requests to restrict content or access customer information, the adoption of terms of service, design and engineering choices that implicate security and privacy, and decisions to provide or terminate services in a particular market.

12. As a matter of transparency, the Guiding Principles state that businesses should be prepared to communicate how they address their human rights impacts externally, particularly when concerns are raised by or on behalf of affected stakeholders.[10] The United Nations High Commissioner for Human Rights has also urged information and communications companies to disclose risks and government demands transparently (see A/HRC/27/37). Meaningful disclosures shed light on, among other things, the volume and context of government requests for content removals and customer data, the processes for handling such requests, and interpretations of relevant laws, policies and regulations.

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[6] See general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the International Covenant on Civil and Political Rights. Other norms of international law may apply directly to the activities of private actors, such as the criminalization of crimes against humanity, war crimes and acts of genocide under international humanitarian law.

[7] Guiding Principles on Business and Human Rights, chap. I (A) (1).

[8] Ibid., chap. II (A) (11)-(13).

[9] Ibid., chap. II (A) (17).

[10] Ibid., chap. II (B) (21).

Corporate transparency obligations may also include a duty to disclose processes and reporting relating to terms of service enforcement and private requests for content regulation and user data.

13. Finally, the responsibility to respect involves attention to the availability of remedies — from moral remedies to compensation and guarantees of non-repetition — when the private actor has caused or contributed to adverse impacts.[11]

14. The Guiding Principles provide a useful starting point for identifying private information and communications responsibilities, but several other projects have also proposed principles for the sector. The Global Network Initiative's Principles on Freedom of Expression and Privacy draw on the experience and expertise of the investor, civil society and academic communities. The European Commission published the *ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*. Relevant civil society initiatives include the Manila Principles of Intermediary Liability, which establish baseline protection for intermediaries in accordance with freedom of expression standards; the African Declaration on Internet Rights and Freedoms, which promotes human rights standards and principles of openness in Internet policy formulation and implementation on the continent; and the Ranking Digital Rights Corporate Accountability Index, which evaluates a set of major private actors in the digital space on the basis of their adherence to freedom of expression and privacy norms. Civil society also acts to check and balance other actors engaged in Internet governance: the Code of Good Practice on Information, Participation and Transparency in Internet Governance, for example, seeks to ensure that relevant processes are meaningfully communicated to the public, accountable to all stakeholders, and emphasize democratic participation.

III. Private sector roles and public/private regulation

A. Impact of private enterprise on freedom of expression

15. The range of private sector roles in organizing, accessing, populating and regulating the Internet is vast and often includes overlapping categories.[12]

1. Enable connection to the Internet

16. While Internet service providers specifically connect their subscribers to the Internet, telecommunication service providers offer a broader range of services, including access to radio, television, telephone and mobile communication. Major multinational corporations offer both categories of service, not only in their State of origin but also globally. Vodafone, for example, is a British provider that owns and operates networks in 27 countries and has partner networks in over 50 additional countries. TeliaSonera, based in Finland and Sweden, serves markets throughout Eurasia, and MTS Russia provides domestic service but also provides telecommunication services in Armenia, Turkmenistan and Uzbekistan. Companies like these often own and maintain significant aspects of the technical infrastructure that transmit Internet and telecommunications traffic, including fibre optic network cables, satellites or wireless links. Internet service providers in local and

[11] Ibid., chap. II (B) (22).

[12] See, for example, "Strategy panel: ICANN's role in the Internet governance ecosystem" (23 February 2014); R. Mackinnon and others, *Fostering Freedom Online: The Role of Internet Intermediaries* (Paris, UNESCO, 2014); and D. A. Hope, *Protecting Human Rights in the Digital Age* (February 2011).

regional markets might operate a limited number of these networks or lease network capacity from large carriers in order to connect their subscribers to the Internet. State ownership is fairly common among service providers: Switzerland, for example, holds 51 per cent of the shares in Swisscom AG,[13] and Uruguay owns Antel, a major telecommunications provider in the country.[14] While telecommunication and Internet service providers are currently the most common providers of Internet access, a growing number of hybrid companies aim to provide Internet access as well as other Internet-related services.[15]

2. Design and maintain hardware and operating systems that facilitate information processing and Internet access

17. Hardware firms design and manufacture the computer devices that connect individuals to the Internet. The range of devices equipped with personal computing functions is, however, ever-expanding and impossible to cap, given the avalanche of connectedness widely described as the "Internet of things", in which digital connection is enabled for all aspects of contemporary existence. Automobiles, refrigerators, televisions and watches are just a few examples of "smart" devices that today incorporate browser, messaging and other Internet-related functions.

18. Further, telecommunication and Internet service providers purchase equipment and other network components that comprise the physical backbone of their networks from infrastructure vendors and equipment manufacturers. These products can range from simple routers and switches to deep packet inspection devices, network filtering and Internet blocking devices, and surveillance monitoring centres. Increasingly these companies also include services, consulting, training and even operation.

3. Allocate web domains

19. Internet addresses (that is, uniform resource locators (URLs)) are allocated and sold by domain name registries and registrars, under the supervision of the Internet Corporation for Assigned Names and Numbers (ICANN), a non-profit entity. Currently, the world's largest registrar hosts more than 61 million domain names.

4. Host information

20. Web-hosting services enable users to upload and deliver files and other materials to their readers' or customers' browsers. These companies typically also provide data storage, e-mail and other services associated with the websites their customers have purchased.

5. Facilitate aggregating, sharing and searching for information

21. Search engines supply the vital connection between users who search for information, and those who create, aggregate and publish it. Indeed, search engine algorithms dictate what users see and in what priority, and they may be manipulated to restrict or prioritize content. Information searches, however, are not unique to search engines. Content aggregators, specialized research services, social media platforms and professional networks also enable users to search for content.

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[13] See www.swisscom.ch/en/about/investors/shares/ownership-structure.html.

[14] See www.antel.com.uy/antel/; http://cs.stanford.edu/people/eroberts/cs181/projects/2006-07/latin-america/uruguayIntro.html.

[15] Google, for example, will provide access to wireless service through its Google Fiber service, in addition to its search, content-hosting and social networking functions, among others. See https://fiber.google.com/about/.

6. Produce and regulate access to one's own content

22. Companies that create or purchase content produced on their platforms often hold the copyright to such content, enabling them to monetize and manage access to it. Some of the most influential copyright holders are media and entertainment companies, including news media, publishing houses, music labels, and film and television studios.

7. Connect users and communities

23. Companies also provide a variety of services that connect users across multiple platforms, including e-mail, web chats, discussion threads, and social and professional networking. The most prominent actors in this area include e-mail providers, social media and other networking platforms, and online bulletin boards. In addition to such platforms, news websites, e-commerce platforms and application stores provide opportunities for the sharing of information and ideas through reviews, comments and discussions. Internet payment systems also integrate a social networking functionality.

8. Sell goods and services and facilitate transactions

24. E-commerce facilitates the sale of goods and services and other commercial transactions among businesses and consumers, businesses and other businesses, or consumers and other consumers. The ways in which companies provide access to, promote, or arrange these transactions, and safeguard the wealth of personal information generated by these transactions, may implicate the freedom of expression and privacy of their customers.

9. Collect, repurpose and sell data

25. The vast majority of enterprises described above collect information from and about their users, which in turn may be used to target advertising, customize existing services, reduce security risks, or shut down accounts of abusive users. Companies may, however, also trade in information collection and analysis, involving such services as designing, customizing or selling surveillance and information analytics technologies, or provide consulting services that facilitate law enforcement, intelligence, cybersecurity and surveillance operations.

B. Regulation in the digital age

26. The regulatory ecosystem on the Internet is extensive and diverse, involving actors at domestic, regional and international levels, in private and public sectors, in academia and civil society. Some aspects of information and communications technology — such as the provision of telecommunication and Internet services — have long attracted State and international regulation as well as public scrutiny. Other areas, such as search, social media, and the sale of surveillance technologies, are also increasingly subject to such scrutiny, commensurate with their growing impact and influence on the exercise of freedom of expression online.

1. Technical standards

27. Technical standards and processes ensure that the infrastructure, networks and applications that comprise Internet and telecommunication networks operate seamlessly. The physical infrastructure on which Internet traffic flows, such as network cables and satellites, are set up and run according to various technical requirements that ensure their smooth functioning. Organizations that develop such requirements include the International Telecommunication Union, which sets standards for the interoperability of

telecommunication networks; the Institute of Electrical and Electronic Engineers, a professional association which develops standards for Wi-Fi transmission; and the Groupe Speciale Mobile Association, a private international association of the mobile industry which develops standards for mobile networks.

28. Another group of organizations establishes and develops technical standards for how Internet data are communicated, stored, arranged and presented. The Internet Engineering Task Force develops and maintains the Transmission Control Protocol/Internet Protocol, which determines how devices connect over the Internet and how data are transmitted between them. The World Wide Web Consortium sets standards concerning the display of, and interaction with, web content, which implicates issues such as language content and access for the disabled. ICANN sets policies for the registration of top-level domain names, whether generic (such as .com, .org, .edu), country code (.cn, .tj, .sg) or community or industry-specific (such as .aero). Its subsidiary, the Internet Assigned Numbers Authority, manages the distribution of Internet Protocol addresses, which assign and identify each device that connects to the Internet with unique numerical labels.

29. While technical standards have profound implications for freedom of expression, the Commission on Science and Technology for Development of the United Nations has observed that standards development often lacks sufficient consideration of human rights concerns.[16] To be sure, interested stakeholders and members of the public are permitted to participate in or observe the work of most of these standard-setting bodies. However, because meaningful participation requires a generally high level of technical expertise, human rights perspectives are not always included in discussions, even though technical and design choices can have a substantial impact on freedom of expression.[17]

2. Internet governance and policymaking

30. International legal instruments do not explicitly address how States and other actors should maintain a free and open Internet, nor may regulation by law always be an appropriate approach. Indeed, Internet governance is not the sole province of specialized bodies or Governments. Most recently, the World Summit on the Information Society emphasized the continuing importance of a governance approach that integrates government, corporate and civil society, academic and technical stakeholders and expertise (see General Assembly resolution 70/125). In the context of global trade, non-discrimination principles established under international agreements administered by the World Trade Organization may require States to restrict or otherwise regulate non-neutral services. The World Intellectual Property Organization has also faced growing demands from member States for advice on legislative frameworks that enable them to implement treaty obligations in digital environments. Regional bodies, such as the African Union, the European Commission and the Organization of American States seek to ensure that global

[16] See Intersessional Panel of the Commission on Science and Technology for Development, "The mapping of international Internet public policy issues" (November 2014).

[17] To be sure, a few organizations have dedicated resources to incorporating human rights perspectives in technical discussions. ICANN, for example, has established a cross community working party on its corporate and social responsibility to respect human rights, which seeks to map and understand the issues and potential solutions relating to corporate and social responsibilities of ICANN from https://community.icann.org/display/gnsononcomstake/CCWP+on+ICANN's+Corporate+and+Social+Responsibility+to+Respect+Human+Rights. A few non-governmental organizations have also made human rights-oriented contributions to technical discussions. See, for example, Neils ten Oever, "Research into human rights protocol considerations", available from https://datatracker.ietf.org/doc/draft-tenoever-hrpc-research/.

Internet policy is formulated and implemented in a manner that takes into account the laws, particularities and concerns of their respective regions.[18]

31. Some organizations that set technical standards have policymaking functions as well. The International Telecommunication Union, for example, develops and coordinates global telecommunications policies. ICANN makes policy judgments about the types of top-level domain names that may be registered and who may claim ownership, in consultation with Governments, the private sector, civil society and other relevant actors.

32. Industry-led initiatives also seek to address Internet governance challenges that are insufficiently addressed by existing legal regulation. The Copyright Alert System, for example, brings together trade associations in the film and recording industries and Internet service providers to develop and implement a unified approach to combating copyright infringement online. The Telecommunications Industry Dialogue brings together telecommunications operators and vendors to address freedom of expression and right to privacy concerns in their sector.

33. While many of these initiatives are privately run, they sometimes collaborate with or receive support from States. For example, the Internet Watch Foundation of the United Kingdom of Great Britain and Northern Ireland, which provides Internet service providers and hosting platforms with a "notice and takedown" service that alerts them to potentially criminal content on their networks, also provides law enforcement agencies with "unique data" in their investigations of such content.

IV. Legal and policy issues

34. The information and communications technology sector's multiple roles raise legal and policy questions that deserve attention and elaboration by international human rights mechanisms.

A. Content regulation

35. Many questions concerning private actors in the digital age focus on content regulation. For instance, how do States facilitate or demand content removal, censorship and unnecessary or disproportionate restrictions on the right to seek, receive and impart Internet content through private platforms and networks? How do private enterprises respond to these demands and other external pressures? When the private sector develops and enforces its own internal policies and standards to protect and promote rights online, how do these have an impact on individual expression and access information?

36. Digital content transmitted on private networks and hosted on private platforms is increasingly subject to State and corporate regulation. The universe of user-generated content is always expanding — blogs, text messages, discussion threads, photographs, videos and social media postings are only a sample of the types of content that users create and share on a daily basis. Companies that manage networks and platforms for this content, known as intermediaries, may "give access to, host, transmit and index content, products

[18] See, for example , European Commission, *ICT Sector Guide* (para. 14 above); and Inter-American Commission on Human Rights, Office of the Special Rapporteur for Freedom of Expression, *Freedom of Expression and the Internet* (2013).

and services originated by third parties" even though they do not create or produce that content.[19]

37. State demands to remove content are often based on such rationales as defamation, blasphemy, election-related regulations, harassment or hate speech, incitement, intellectual property, obscenity and indecency, terrorist recruitment or "glorification", the protection of national security and public safety, child protection and the prevention of gender-based attacks. Problems long connected to freedom of expression but increasingly complicated in the digital age have also attracted State regulation, including the "right to be forgotten" and pluralism and diversity (for example, network neutrality). Intermediaries themselves establish and enforce terms of service designed to address many of these concerns, for legal, commercial and other reasons. Many of these issues raise questions about the appropriate balance between freedom of expression and other human rights (for example, privacy, non-discrimination). While content regulations are often restrictive in nature, they may also require the transmission of Government-mandated or approved messages,[20] or prohibit differential pricing for content and content delivery services.[21]

1. State regulation

38. States regulate digital content through a variety of legal, political and technical means. Trends of concern include the following.

Vague laws

39. Content regulations are commonly reflected in legislation, court orders or directives or by-laws issued by administrative bodies with delegated authority to manage telecommunications and Internet-related issues. For example, China recently amended its cybersecurity law to forbid persons and organizations from using the Internet to "upse[t] social order" or "har[m] the public interest".[22] Similarly, a draft bill under consideration in Nigeria prohibits anyone from publishing statements in "any medium" with "malicious intent to discredit or set the public against" any person, group or government institution.[23] Such language gives broad discretion to authorities to determine what kinds of digital expression would violate their terms. As a result, individuals and businesses are likely to err on the side of caution in order to avoid onerous penalties, filtering content of uncertain legal status and engaging in other modes of censorship and self-censorship.

Excessive intermediary liability

40. States often require the cooperation of intermediaries to enforce regulations on private networks and platforms. Internet and telecommunication service providers, for example, are required to comply with local laws and regulations as a condition of their operating licences, a legitimate requirement which becomes problematic when the local laws or their implementation are themselves inconsistent with human rights law. Companies less constrained by licensing requirements, such as social networking platforms,

[19] MacKinnon and others, *Fostering Freedom Online*, p. 19; K. Perset, *The Economic and Social Role of Internet Intermediaries* (OECD, 2010).

[20] See Vodafone Group Plc, "Response on issues relating to mobile network operations in Egypt" (2011).

[21] India, for example, prohibits service providers from offering or charging discriminatory tariffs for data services on the basis of content (Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016).

[22] China, Cybersecurity Law (2015), art. 9.

[23] Parliament of Nigeria, A bill for an act to prohibit frivolous petitions and other matters connected therewith, sect. 3 (3).

search engines and domain name registrars, nevertheless face the threat that States will disrupt local infrastructure, threaten the safety of local employees, or block local access to their platforms.

41. Private actors may also request intermediaries to restrict or remove content. For instance, intellectual property complaints often arise when a private party alleges that a person has shared or used content in a manner that violates its copyright or has created a domain name that violates its trademark. While fair use and other defences to such complaints may be available, intellectual property frameworks may inhibit cultural and artistic expression (see A/HRC/28/57).

42. The European Court of Justice, in *Google Spain v. Mario Costeja González*, compelled Google under the Data Protection Directive of the European Union to delist search results based on web pages that identified González, even though the original publication of those pages was itself not subject to takedown.[24] The decision has found an active life outside the European context.[25] The scope and implementation of this approach raise questions about the appropriate balance between the rights to privacy and protection of personal data on one hand, and the right to seek, receive and impart information containing such data on the other.

43. Intermediaries are increasingly required to assess the validity of State requests and private complaints against general legal criteria, and remove or delink such content based on such assessments. For example, the Cybercrime Act, 2015 of the United Republic of Tanzania only exempts hyperlink providers from liability for information linked provided that they "immediately remove[ ] or disable[ ] access to the information after receiving an order to do so from the relevant authority".[26] In the context of copyright, the Digital Millennium Copyright Act of the United States of America exempts providers of "online services and network access" from liability for third party content only if they respond "expeditiously to remove, or disable access to the material that is claimed to be infringing or to be the subject of infringing activity" upon notice of such infringement.[27] These notice and takedown frameworks have been criticized for incentivizing questionable claims and for failing to provide adequate protection for the intermediaries that seek to apply fair and human rights-sensitive standards to content regulation.

44. Another major concern is that private intermediaries are typically ill equipped to make determinations of content illegality. The Inter-American Commission on Human Rights has observed that private actors "lack the ability to weigh rights and to interpret the law in accordance with freedom of speech and other human rights standards".[28] This may be due to resource constraints, lack of oversight and accountability, or potential conflicts of interest. In the face of potential liability, companies may be prone to self- or over-censorship.

Extralegal restrictions

45. States also seek to restrict digital content outside the law. Some States have pushed for social media companies and other hosts of user-generated content to monitor and take down content on their own initiative, rather than wait for law-based requests from the Government. Government officials have also attempted to persuade companies to adopt "counter-speech" initiatives through public forums, campaigns and in private discussions.

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[24] Judgment of the European Court of Justice (Grand Chamber), case C-131/12 (13 May 2014).
[25] Submission of Article 19.
[26] Para. 43 (a).
[27] United States Code, title 17, sect. 512 (c) (1) (C).
[28] Inter-American Commission on Human Rights, *Freedom of Expression and the Internet*, pp. 47-48.

Governments are also increasingly flagging content on social media as inappropriate under a platform's terms of service, in order to prompt the company to remove the content or deactivate an account.

Filtering

46. States often block and filter content with the assistance of the private sector. Internet service providers may block access to specific keywords, web pages or entire websites. On platforms that host content, the type of filtering technique depends on the nature of the platform and the content in question. Domain name registrars may refuse to register those that match a government blacklist; social media companies may remove postings or suspend accounts; search engines may take down search results that link to illegal content. The method of restriction required by Governments or employed by companies can raise both necessity and proportionality concerns, depending on the validity of the rationale cited for the removal and the risk of removal of legal or protected expression.

47. Ambiguities in State regulation coupled with onerous intermediary liability obligations could result in excessive filtering. Even if content regulations werevalidly enacted and enforced, users may still experience unnecessary access restrictions. For example, content filtering in one jurisdiction may affect the digital expression of users in other jurisdictions. While companies may configure filters to apply only to a particular jurisdiction or region, there have been instances where they were nevertheless passed on to other networks or areas of the platform. For instance, in 2013 State-mandated filtering carried out by Airtel India led to restrictions on the same content on several networks in Oman belonging to its partner, Omantel.[29]

Network or service shutdowns

48. Service shutdowns and associated restrictions are a particularly pernicious means of enforcing content regulations. Such measures are frequently justified on the basis of national security, the maintenance of public order or the prevention of public unrest. In 2015, the Special Rapporteur, together with representatives of the Organization for Security and Cooperation in Europe, the Organization of American States and the African Commission on Human and Peoples' Rights condemned as unlawful Internet "kill switches".[30] In one year alone, there were reports of shutdowns in Bangladesh, Brazil, Burundi, the Democratic Republic of the Congo, India and Pakistan.[31] The Special Rapporteur confirmed instances of telecommunication service provider and service shutdowns in Tajikistan, during his official visit in March 2016.[32]

Non-neutral networks

49. In addition to refraining from unnecessary and disproportionate restrictions on digital access, States also have a duty to ensure a free and open Internet. Network neutrality is the principle that all Internet data, content and services be treated equally and without improper discrimination. However, Internet service providers may deploy technologies that speed up or otherwise favour access to certain content and services, while slowing down others (a practice also known as "throttling"). The growing number of collaborations between Internet service providers and content-hosting platforms that offer free wireless data to access online content or services provided by the latter (also known as the provision of "zero rated" services) has attracted controversy. While such measures detract from the

[29] Citizen Lab, "Routing gone wild: documenting upstream filtering in Oman via India" (2012).

[30] Joint declaration on freedom of expression and responses to conflict situations (2015).

[31] Submission of Institute for Human Rights and Business at 3.

[32] Preliminary observations by the United Nations Special Rapporteur on the right to freedom of opinion and expression, Mr. David Kaye at the end of his visit to Tajikistan (9 March 2016).

principle of net neutrality, it remains a subject of debate whether they may be permissible in areas genuinely lacking Internet access.

50. State regulation in this area is patchy and uncertain. A few States have recognized the general importance of network neutrality. Romania, for example, has stated that it is "in favour of all initiatives to guarantee that online information can be accessed in a meaningful way by the entire population".[33] Fewer States have provided specific legal protection.[34] In early 2016, the Telecom Regulatory Authority of India issued a regulation prohibiting service providers from offering or charging "discriminatory tariffs for data services being offered or charged to the consumer on the basis of content".[35] Some form of network neutrality has been adopted in law or policy by countries including Brazil, Chile, the Netherlands and the United States.

2. Internal policies and practices

51. Intermediaries' policies and rules may have significant effects on the freedom of expressionWhile terms of service are the primary source of regulation, design and engineering choices may also affect the delivery of content.

Terms of service

52. Terms of service, which individuals typically must accept as a condition to access a platform, often contain restrictions on content that may be shared. These restrictions are formulated under local laws and regulations and reflect similar prohibitions, including those against harassment, hate speech, promotion of criminal activity, gratuitous violence and direct threats.[36] Terms of service are frequently formulated in such a general way that it may be difficult to predict with reasonable certainty what kinds of content may be restricted. The inconsistent enforcement of terms of service has also attracted public scrutiny. Some have argued that the world's most popular platforms do not adequately address the needs and interests of vulnerable groups; for example, there have been accusations of reluctance "to engage directly with technology-related violence against women, until it becomes a public relations issue".[37] At the same time, platforms have been criticized for overzealous censorship of a wide range of legitimate but (perhaps to some audiences) "uncomfortable" expressions.[38] Lack of an appeals process or poor communication by the company about why content was removed or an account deactivated adds to these concerns. Terms of service that require registration linked to an individual's real name or evidence to demonstrate valid use of a pseudonym can also disproportionately inhibit the ability of vulnerable groups or civil society actors in closed societies to use online platforms for expression, association or advocacy.

53. States also increasingly rely on terms of service to remove content they find objectionable. The Special Rapporteur on the promotion and protection of human rights while countering terrorism has observed that several States have established content-removal mechanisms that often seek the removal of content that, while lawful, might be regarded as extremist (see A/HRC/31/65). The Counter Terrorism Internet Referral Unit in the United Kingdom, for example, is dedicated to removing online content of a "violent extremist or terrorist nature", including through methods that "use websites' content-

[33] Submission of the Government of Romania.
[34] Mackinnon and others, *Fostering Freedom Online*, p. 80.
[35] Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016.
[36] See, for example, Facebook terms of service, sect. 3 (7); Twitter terms of service; YouTube Community Guidelines; and Reddit.
[37] See https://ourinternet-files.s3.amazonaws.com/publications/no24_web_2.pdf.
[38] See onlinecensorship.org.

flagging mechanisms to report content as a violation of the site's [terms of service]".[39] Such practices raise the prospect that States may rely on private terms of service to bypass human rights or domestic law norms against content restrictions.

54. The work of private censorship is complicated by the sheer volume of complaints and flagged content that intermediaries identify on a daily basis. Large platforms may also outsource content moderation, creating even more distance between content moderators and internal policymaking decisions, and exacerbating inconsistencies in enforcement. Intermediaries that operate in a diverse range of markets inevitably face "complex value judgments", issues with cultural sensitivity and diversity, and "difficult decisions about conflicts of law".[40]

Design and engineering choices

55. The manner in which intermediaries curate, categorize and rank content affects what information users access and view on their platforms. For example, platforms deploy algorithmic predictions of user preferences and consequently guide the advertisements individuals might see, how their social media feeds are arranged and the order in which search results appear.[41] Other self-regulatory measures, such as "counter speech" initiatives to support anti-terror or anti-harassment messages,[42] also affect the ways in which users might consume and process Internet content concerning sensitive topics. It remains an open question how freedom of expression concerns raised by design and engineering choices should be reconciled with the freedom of private entities to design and customize their platforms as they choose.

B. Surveillance and digital security

56. State surveillance and corporate data collection and retention raise substantial issues of freedom of expression. For instance, how do States conduct surveillance activities with the cooperation of the private sector, and how does such cooperation have an impact on freedom of expression? What are the responsibilities of private actors when they discover that States covertly access Internet and telecommunications data transmitted or stored on their networks or platforms? What are the responsibilities of the private sector to protect security and anonymity online?

57. Digital communications and data transmitted or stored on private networks and platforms are increasingly subject to surveillance and other forms of interference, whether by the State or private actors. Unnecessary and disproportionate surveillance may undermine security online and access to information and ideas (see A/HRC/23/40). Surveillance may create a chilling effect on the online expression of ordinary citizens, who may self-censor for fear of being constantly tracked. Surveillance exerts a disproportionate impact on the freedom of expression of a wide range of vulnerable groups, including racial, religious, ethnic, gender and sexual minorities, members of certain political parties, civil society, human rights defenders, professionals such as journalists, lawyers and trade unionists, victims of violence and abuse, and children (see A/HRC/29/32). State capacity to

[39] National Police Chiefs' Council, Counter Terrorism Internet Referral Unit; submission of the Center for Technology and Democracy.

[40] Emily Taylor, *The Privatization of Human Rights: Illusions of Consent, Automation and Neutrality*, GCIG Paper No. 24 (2016).

[41] Submission of the Center for Technology and Society; Ranking Digital Rights.

[42] See, for example, Home Affairs Committee, Oral testimony of Anthony House, Google Europe, Middle East and Africa (2 February 2016).

conduct surveillance may depend on the extent to which business enterprises cooperate with or resist such surveillance.

1. Requests for customer data

58. As Internet service providers, social networking platforms, search engines, cloud service providers and other companies transmit or amass enormous quantities of customer data, the volume of government requests for user information based on local laws and regulations has also begun to rise. Several major Internet companies have reported an increase in requests.[43] Many of these requests are issued by law enforcement and intelligence agencies. State oversight of these requests varies, ranging from prior judicial authorization[44] to high-level executive approval[45] to none at all. Licensing agreements and the law may limit the ability of the private sector to resist these requests or compel accountability. Even content-hosting platforms, which lack physical presence in certain jurisdictions where they operate, may face the wholesale blocking of their service and attempts to intimidate employees of corporate subsidiaries. Nevertheless, companies in all areas of the information and communications technology industry are capable of establishing and exercising varying degrees of leverage in their relationships with States to resist or mitigate the harm caused by abusive application of the law. Effective strategies of resistance include: the inclusion of human rights guarantees in licensing agreements and other relevant contracts; restrictive interpretations of government requests; negotiations with government officials about the scope of such requests; judicial challenge of overbroad requests or laws; providing affected individuals, the media or public with relevant information; and suspension of service within, withdrawal from, or decisions not to enter a particular market.

2. Sale of surveillance and censorship equipment

59. The private sector supplies hardware, software and other technologies that enable States to intercept, store or analyse communications and other information. Infrastructure vendors, hardware manufacturers and software developers may design or customize products on behalf of States, or supply dual use equipment and technology that States subsequently tailor for their own needs. Internet and telecommunication service providers may also purchase equipment or software from these companies to install on their network components in order to comply with legally mandated interception protocols in the States where they operate. States may rely on these products and services to target, harass or intimidate members of vulnerable groups.

3. Covert surveillance

60. States may also covertly tap into the technical infrastructure belonging to service providers and content platforms in order to intercept a wide variety of information, including communications, user account information, and telephone and Internet records. States reportedly tamper with computer hardware while en route to customers, infiltrate private networks and platforms with malicious software, hack into specific devices, and exploit other digital security loopholes. When business enterprises have notice of such surveillance, questions concerning their human rights responsibilities may arise, such as providing notice to customers or mitigating such harm through security measures. Companies that sell equipment and services to Governments to implement covert

[43] See recent transparency reports from Google, Facebook, Dropbox, Twitter and Microsoft.
[44] Sweden, Act on Signal Surveillance for Defense Intelligence Activities, sect. 4 (3).
[45] Australia, Telecommunications (Interception and Access) Act 1979, sect. 9 (1).

surveillance techniques may be implicated in human rights violations that flow from their sales.

4. Mutual legal assistance treaties and data localization

61. It is important to note that surveillance is affected by other demands on privately held information. For example, the inability of the mutual legal assistance treaty regime to keep pace with cross-border data demands may drive States to resort to invasive extraterritorial surveillance measures. Laws that require companies to retain customer data or store such data in local data centres may also encourage such surveillance.

5. Encryption and anonymity

62. Since the Special Rapporteur reported on the importance of encryption and anonymity for protecting freedom of opinion and expression, government pressure on corporations to compromise the security of their customers' digital devices, communications and information has grown. A range of private entities, from hardware manufacturers to e-mail services to messaging services, have been taking measures to develop and implement technologies that enhance user security, anonymity and privacy. These measures include end-to-end encryption for digital communications, disk encryption and timely software updates to close security loopholes. In response, States are seeking to compel companies to create or exploit technical loopholes in their products and services on their behalf. In the United States, for example, the Federal Bureau of Investigation applied to a federal court to compel Apple to create software that facilitates access to a suspect's iPhone in a terrorism investigation. The Investigative Powers Bill introduced before the British Parliament on 1 March 2016 would authorize intelligence services to apply for a warrant that requires private entities to "secure interference with any equipment for the purpose of obtaining communications [...] equipment data and any other information".[46]

C. Transparency

63. Transparency can help ensure that subjects of Internet regulation are able to meaningfully predict their legal obligations and challenge them where appropriate. Gaps in compliance with these standards threaten the ability of individuals to understand the limits placed on their freedom of expression online and seek appropriate redress when their rights are violated. Transparency issues arise in both State and private sector contexts, such as public-private partnerships, private sector engagement in trade negotiations and the digital arms race.

64. Despite multiple reform attempts, transparency concerning government requests is still lacking. While there has been some improvement in transparency reporting concerning government requests for user information, there is far less information available about the volume and nature of government requests to restrict or remove content.[47] It is unclear whether such statistics are even retained. State restrictions on private disclosures of relevant information can be a major obstacle to corporate transparency. Several States prohibit disclosures concerning government requests for content removal or access to user data. India, for example, prohibits online intermediaries from disclosing details of government orders to block access to Internet content, as well as any action they take in response to

[46] Investigatory Powers Bill (2015), Cl. 88 (2).

[47] Submissions of Freedom Online Coalition Working Group on Privacy and Transparency Online; and Telecommunications Industry Dialogue.

such orders.[48] The British Investigative Powers Bill would prohibit telecommunication service providers from disclosing, among other things, "the existence and contents" of government orders to retain customers' communications data.[49] In other States, ambiguous laws and regulations make it difficult for corporations to determine what kinds of information they are permitted to disclose. In South Africa, for example, private disclosures of government requests for customers' data are prohibited,[50] but it is unclear whether the same restriction extends to content removal requests.[51]

65. In the context of the private sector, service providers and content-hosting platforms often disclose at least some information about the circumstances under which they remove content or comply with government requests for customer data. There is wide variation, however, in whether and how they convey interpretations or explanations of State regulations and terms of service, and internal processes for implementation and enforcement. There are also gaps in corporate disclosure of statistics concerning the volume, frequency and types of request for content removals and user data, whether because of State-imposed restrictions or internal policy decisions. In any case, companies are more likely to disclose statistics concerning government requests than private requests. There has also been far less research into the extent to which other intermediaries (for example, financial or e-commerce intermediaries) and companies disclose information concerning content removals and requests for customer data.

66. Ongoing debate about the minimum standards for corporate disclosures and relevant best practices reflects uncertainty about the appropriate balance between transparency and competing values, such as individual security and trade secrecy. While there is growing consensus that corporations should disclose information about how restrictions are interpreted and enforced, there is less agreement about how this should be done. Similarly, there is widespread agreement about the importance of quantitative transparency, but it is less clear how such information should be contextualized, presented and made accessible.

D. Remedies

67. Restrictions on freedom of expression online occur on a daily basis and frequently involve corporate conduct, whether compelled by law or pursuant to corporate policy and practice (for example, as reflected in terms of service). Common examples of such restrictions include unlawful or otherwise questionable content removals, service restrictions and account suspensions, and data security breaches.

68. Under article 2 (3) of the International Covenant on Civil and Political Rights, States parties must ensure that persons whose rights under the Covenant have been violated have an effective remedy. The Guiding Principles on Business and Human Rights anticipate that corporations should provide remedial and grievance mechanisms that are legitimate, accessible, predictable, equitable, rights-compatible, transparent, based on dialogue and engagement, and a source of continuous learning.[52] There is limited guidance, however, as to how these elements should be operationalized or assessed in the context of information and communications technology. For example, improper removal of web links from search

[48] India, Information Technology (Procedures and Safeguards for Blocking for Access of Information by Public) Rules, 2009, rule 16.

[49] Investigatory Powers Bill, Cl. 84 (2).

[50] South Africa, Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002, sect. 42 (1).

[51] South Africa, National Key Points Act 102 of 1980, sect. 10 (c).

[52] Guiding principles, chap. III (A) (31).

results might require the search engine to reinstate such links. It is, however, unclear how complaint or appeals mechanisms should be designed and implemented to ensure that such removals are effectively flagged, evaluated and remedied. A search engine's highly dispersed customer base further complicates design issues. It is also unclear whether companies should provide additional remedies, like financial compensation for lost revenue during the period of removal, or guarantees of non-repetition.

69. To enforce terms of service, companies may not always have sufficient processes to appeal content removal or account deactivation decisions where a user believes the action was in error or the result of abusive flagging campaigns. Further research that examines best practices in how companies communicate terms of service enforcement decisions and how they implement appeals mechanisms may be useful.

70. The scope of the corporation's responsibility to remediate is also contested. Who bears the burden of remediating improper removals or data requests when companies interpret or enforce relevant State laws too strictly? When a company's products or services are used to perpetrate human rights abuses, what degree of causation triggers the duty to provide a remedy? When companies face allegations of wrongdoing, is there a duty to conduct internal investigations, and must these investigations meet certain standards? Where a restriction implicates individuals across borders, what jurisdiction is appropriate for the consideration of remedies? These questions reflect the uncertainty that human rights victims face in situations where corporate and State conduct are intertwined.

71. The appropriate role of the State in supplementing or regulating corporate remedial mechanisms also requires closer analysis. Civil proceedings and other judicial redress are often available to consumers adversely affected by corporate action, but these are often cumbersome and expensive. Meaningful alternatives may include complaint and grievance mechanisms established and run by consumer protection bodies and industry regulators. Several States also mandate internal remedial or grievance mechanisms: India, for example, requires corporations that possess, deal with or handle sensitive personal data to designate grievance officers to address "any discrepancies and grievances [...] with respect to processing of information".[53]

V. Further thematic development

72. Given the range of private information and communications technology activity that frames and impacts the exercise of the freedom of opinion and expression online, the Special Rapporteur will focus on State obligations and business responsibilities in specific areas of concern. The legal and policy issues raised above will guide thematic reporting, communications with Governments, country and company visits, regional and expert consultations, and other work.

73. Among the Special Rapporteur's priorities for thematic study and guidance are the following:

Restrictions on the provision of telecommunications and Internet services

74. Governments increasingly require private entities providing telecommunications and Internet service to comply with censorship demands. In addition to network filtering practices, States compel or pressure companies to shut down networks or block entire services. This trend requires further documentation and scrutiny. Future work will examine

[53] India, Information Technology Act, 2008, sect. 43 A; Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011, rule 5 (9).

laws, policies and extralegal measures that enable Governments to undertake such restrictions, and the costs and consequences of such restrictions. The Special Rapporteur will also examine the responsibilities of companies to respond to such measures in a way that respects rights, mitigates harm and provides avenues for redress where abuses occur.

Content restrictions under terms of service and community standards

75. Private actors face substantial pressures from Governments and individuals to restrict expression deemed to constitute extremism or hatred, hostility or harassment. Private actors may also themselves aim to foster what they perceive to be civil discourse on their platforms, regulate access through real-name requirements and other registration policies, or feature or prioritize certain content for business reasons. Future work will evaluate the potential of State abuse of private initiatives, the impact of private measures on freedom of expression, and the relevant human rights obligations and responsibilities. This reporting will not only focus on the roles of social media and search engines, but also lesser known actors such as e-commerce and financial intermediaries.

Liability for content hosting

76. Intermediaries are increasingly held responsible for third party content that they host, whether through intermediary liability regimes or censorship requirements. Commonly cited rationales for such restrictions include cybersecurity, copyright, defamation and data protection. Further study will focus on the legitimate scope of such rationales, the necessity of accompanying restrictions, and the lack of procedural safeguards under existing frameworks for removing third party content. Future work will also examine sources and modes of intermediary liability in particular contexts and regions and seek to draw out the main principles and practices applicable in order to ensure the ability of intermediaries to promote and protect freedom of expression.

Censorship and surveillance industry

77. Private companies play a major role in the development, production and transfer of software and hardware that Governments may deploy for law enforcement, intelligence and public security purposes. While such tools may have legitimate purposes, they are often deployed by Governments for purposes of censorship and disproportionate surveillance. Future work will explore such issues through the human rights framework and encourage due diligence in identifying the uses of such technologies for purposes that undermine freedom of expression.

Efforts to undermine digital security

78. Companies that transmit, store or generate communications and other forms of user data — particularly telecommunication and Internet service providers, and content-hosting platforms — face mounting demands from law enforcement and security services for access to their customers' information. Future work will seek to identify approaches that could maximize the scope for freedom of expression while nonetheless addressing legitimate governmental interests in national security and public order.

Internet access

79. The billions of individuals who are connected online enjoy access to information and ideas that is denied billions more who lack the infrastructure or political, security, legal or social environment necessary for connectivity. As the private sector increasingly seeks to empower the next billions with access, it will be critical to ensure that such access is free, open and secure. Future work will explore issues around access and private sector

engagement and investment in ensuring affordability and accessibility, particularly considering marginalized groups.

Internet governance

80. The outcome of the World Summit on the Information Society demonstrated the continuing broad support for multi-stakeholder governance of the Internet. The existing model nonetheless faces increasing pressure in the form of specific national policies (such as data localization) and strategies such as "cybersovereignty". Moreover, there is a persistent need to maintain or increase human rights participation at all levels of governance, including the setting of technical standards, and to ensure that Internet governance frameworks and reform efforts are sensitive to the needs of women, sexual minorities and other vulnerable communities.

81. Throughout this future work, the Special Rapporteur will pay particular attention to legal developments (legislative, regulatory, and judicial) at national and regional levels. In this context, he alerts all stakeholders to his interest in gathering such materials for future communications and reporting and encourages interested parties to collect and provide such material throughout the course of this work.

VI. Conclusions and recommendations

82. The information and communication technology sector is always in rapid development, continually upgrading technology, digitizing everyday life. As a result, addressing legal and policy issues with an eye to current normative gaps involves some risk of failing to address trends that are only now emerging or have yet to emerge. This is a natural feature of the digital age, but even with rapid change in technology, the digital environment will continue to be animated by persistent threats to freedom of opinion and expression. These threats include government dominance of, or attempts to dominate, sources of information, using tools of censorship against online services and infrastructure; the struggle of businesses to promote their products and services in environments that are hostile to freedom of expression; the failures of many business enterprises to ensure the promotion and protection of rights in their pursuit of commercial interests; and the often contradictory demands of individuals that business entities provide them not only with security but also convenience, connectivity and community. As the project of exploring information and communication technology responsibilities moves forward, the Special Rapporteur will be looking to experts in the field —in Government, the private sector, civil society, the technical community, academia — to help him conduct analysis and reporting that respond both to the current issues at the intersection of technology and freedom of expression and to long-term features of the digital age.

83. The Special Rapporteur strongly encourages all stakeholders — whether State actors, private sector enterprises or civil society organizations and individuals — to take an active part in the development of the forthcoming projects. He particularly encourages stakeholders from less developed countries and vulnerable communities to share perspectives on the impact that the information and communication technology sector may have on the enjoyment of rights and the role that States may play in either interfering with or advancing those rights.

84. Even though this project is at its early stages, it is nonetheless critical that States and private actors take steps to ensure respect for the freedom of opinion and expression. These steps should include, at a minimum, the following, with further analysis to follow throughout the Special Rapporteur's mandate.

States

85. States bear a primary responsibility to protect and respect the right to exercise freedom of opinion and expression. In the information and communication technology context, this means that States must not require or otherwise pressure the private sector to take steps that unnecessarily or disproportionately interfere with freedom of expression, whether through laws, policies, or extralegal means. Any demands, requests and other measures to take down digital content or access customer information must be based on validly enacted law, subject to external and independent oversight, and demonstrate a necessary and proportionate means of achieving one or more aims under article 19 (3) of the International Covenant on Civil and Political Rights. Particularly in the context of regulating the private sector, State laws and policies must be transparently adopted and implemented.

86. Governments must also adopt and implement laws and policies that protect private development and the provision of technical measures, products and services that advance freedom of expression. They must ensure legislative, policymaking and other relevant norm-setting processes concerning rights and restrictions on the Internet in order to provide the private sector, civil society, the technical community and academia meaningful opportunities for input and participation.

Private sector

87. States place undeniable pressures on the private information and communication technology sector that often lead to serious restrictions on the freedom of expression. The private sector, however, also plays independent roles that may either advance or restrict rights, a point the Human Rights Council well understood by adopting the Guiding Principles on Business and Human Rights in 2011 as general guidance in that field. Private entities should be evaluated on the steps they take both to promote and undermine freedom of expression, even in hostile environments unfriendly to human rights.

88. Among the most important steps that private actors should take is the development and implementation of transparent human rights assessment procedures. They should develop and implement policies that take into account their potential impact on human rights. Such assessments should critically review the wide range of private sector activities in which they are engaged, such as the formulation and enforcement of terms of service and community standards on users' freedom of expression, including the outsourcing of such enforcement; the impact of products, services and other commercial initiatives on users' freedom of expression as they are being developed, including design and engineering choices, and plans for differential pricing of or access to Internet content and services; and the human rights impact of doing business with potential government customers, such as the operation of telecommunication infrastructure or the transfer of content-regulation or surveillance technologies.

89. It is also critical that private entities ensure the greatest possible transparency in their policies, standards and actions that implicate the freedom of expression and other fundamental rights. Human rights assessments should be subject to transparent review, in terms of their methodologies, their interpretation of legal obligations and the weight that such assessments have on business decisions. Transparency is important across the board, including in the context of content regulation, and should include the reporting of government requests for takedowns.

90. Beyond adoption of policies, private entities should also integrate commitments to freedom of expression into internal policymaking, product engineering, business

development, staff training and other relevant internal processes. The Special Rapporteur will aim to explore policies and the full range of implementation steps in a number of ways, including through company visits.

International organizations and multi-stakeholder processes

91. As the present report has shown, many international organizations play a role in information and communication technology governance processes. It is critical that such organizations provide meaningful public access to policies, standards, reports and other information concerning Internet governance created or generated by the organization and/or its membership, including through facilitating access to free online resources and public education initiatives. More generally, the multi-stakeholder process for Internet governance has been an important driver for policies supportive of freedom of expression. With that in mind, international organizations should ensure meaningful civil society participation in policymaking and other standard-setting processes, including through increasing the presence of technical experts sensitive to human rights concerns.